Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1960

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The Commonwealth of Massachusetts

BOSTON, December 7, 1960.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1960.

Respectfully submitted,

EDWARD J. McCORMACK, JR.,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
EDWARD J. McCORMACK, JR.

First Assistant Attorney General
FRED WINSLOW FISHER

Assistant Attorneys General

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JAMES W. BAILEY[1]
GERALD A. BEELIN
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GEORGE BREGIANES
CHARLES M. BURWICK[2]
FRANCIS R. DOBROWSKI
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JOSEPH T. DOYLE[4]
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EDWIN LIVINGSTONE, JR.[6]
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NATHAN S. PAVEN
WILLIAM H. SULLIVAN
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ROBERT H. TOBIN
HERBERT E. TUCKER, JR.

Assistant Attorney General; Director, Division of Public Charities
RICHARD H. GENS

Assistant Attorneys General assigned to Department of Public Works

DOMENICO J. ALFANO
CHARLES E. FRAZIER, JR.
DANIEL P. KILEY, JR.
PHILIP LEMELMAN
JOSEPH F. LYONS
JOHN W. McGARRY
WILLIAM D. QUIGLEY
JOSEPH P. ZAJAC

Assistant Attorneys General assigned to Metropolitan District Commission

DANIEL W. CARNEY
JOSEPH H. ELCOCK, JR.
JOHN J. GRIGALUS[1]

Assistant Attorneys General assigned to Division of Employment Security

JOSEPH S. AYOUB
WILLIAM C. ELLIS

Assistant Attorney General assigned to Veterans' Division
LEO SONTAG

Chief Clerk
RUSSELL F. LANDRIGAN

Head Administrative Assistant
EDWARD J. WHITE[7]

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[1] Appointed, May 2, 1960.
[2] Resigned, Dec. 14, 1959.
[3] Resigned, Sept. 11, 1959.
[4] Appointed, Sept. 14, 1959.
[5] Appointed, Dec. 22, 1959.
[6] Leave of Absence, Apr. 15, 1960.
[7] Appointed, Sept. 1, 1959.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1959, to June 30, 1960

Appropriations.

Attorney General's Salary	$15,000 00
Administration, Personal Services and Expenses	337,653 00
Claims, Damages by State Owned Cars	90,000 00
Small Claims	10,000 00
Veterans' Legal Assistance	18,600 00
Total	$471,253 00

Expenditures.

Attorney General's Salary	$15,000 00
Administration, Personal Services and Expenses	335,661 73
Claims, Damages by State Owned Cars	89,999 40
Small Claims	10,000 00
Veterans' Legal Assistance	18,600 00
Total	$469,261 13

By JOSEPH T. O'SHEA,
For the Comptroller,

Approved for publishing.

FREDERICK J. SHEEHAN,
Comptroller.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 7, 1960.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, as amended, I herewith submit my report.

The cases requiring the attention of this department during the fiscal year ending June 30, 1960, totaling 18,944, are tabulated as follows:

Extradition and interstate rendition	119
Land Court petitions	176
Land damage cases arising from the taking of land:	
Department of Public Works	1,547
Metropolitan District Commission	170
Civil Defense	2
Department of Mental Health	1
Department of Natural Resources	20
Department of Public Safety	1
Department of Public Utilities	1
Lowell Technological Institute	2
Massachusetts Maritime Academy	7
Massachusetts Turnpike Authority	1
State Reclamation Board	2
Miscellaneous cases, including suits for the collection of money due the Commonwealth	6,599
Estates involving application of funds given to public charities	1,660
Settlement cases for support of persons in State institutions	12
Pardons:	
Investigations and recommendations in accordance with G. L. c. 127, § 152, as amended	80
Small claims against the Commonwealth	266
Workmen's compensation cases, first reports	5,957
Cases in behalf of Division of Employment Security	501
Cases in behalf of Veterans' Division	1,820

Introduction.

The fiscal year covered by this report began on the first day of the seventh calendar month of my service in the office for the two-year term to which I was elected at the State election in November, 1958. During the period a wide variety and great number of legal matters arising in the ordinary course of the operation of the State government required the attention of the staff. The office engaged in extensive litigation in all the State and Federal courts, and advised State officers, departments, bureaus,

boards and commissions. The work involved the interpretation of existing statutes as well as drafting, and assisting in the drafting of, new legislation. As in the past, we rendered opinions to the Governor on bills relating to legal matters coming before him for his signature. In addition to the handling by the staff of the great volume of business coming before the office in the ordinary course, the Division of Civil Rights and Liberties, and the Division of Consumer Counsel, both of which I established, continued their programs for the protection of the civil rights of citizens, and the protection of the consumer. Statements of the more important activities of those divisions, and of the other divisions and units of the department, are set forth below.

Consumer Council and Division of Consumer Counsel.

The Advisory Consumer Council consisting of ten leading economists and experts in the field of consumer problems which I appointed in 1958, continued its efforts on behalf of the consumer, and, working in conjunction with my Division of Consumer Counsel, concentrated on five main fields of activity, namely, (1) Milk, (2) Transportation, (3) Antitrust, (4) Consumer Fraud, (5) Public Utilities.

Milk.

As a result of the challenge by the Attorney General's Advisory Consumer Council of the legality of the price-fixing order entered by the Milk Control Commission, the commission made findings purporting to show continued need for price regulation of retail sales. Under the statutes, this finding had to be submitted to the Milk Regulation Board for review and approval. On July 1, the board met and by a 2–2 tie ended the price regulations.

Several dealers then commenced a price war which threatened the financial security of the smaller dealers. Because the commission was unable or unwilling to stop these price wars, I called upon the Federal Trade Commission for assistance. In cooperation with my office, we developed sufficient facts to enable us to start actions at State and Federal levels to attempt to stop the unfair competition. Most of these cases were still pending at the end of the current fiscal year.

Professor Philip Gamble, a member of the Consumer Council, and I appeared before a special Congressional Subcommittee on Small Business Problems in the Dairy Industry, to review for the committee the whole problem of milk control and milk prices in the Commonwealth. Also, with the concurrence of the Advisory Consumer Council, I announced my unalterable opposition to proposed legislation which would impose permanent milk price fixing in the greater Boston area.

I again sponsored legislation to constitute the Consumer Council as a statutory body with rights to appeal rate decisions in the courts. This bill passed the House but was defeated in the Senate. Because I feel very strongly that there is an urgent need to protect the consumer from unfair

and unethical practices which may exist, and because there is need for public representation before administrative and legislative bodies, I again urged the General Court to enact such legislation.

Railroad and Mass Transportation.

A continuing and a constantly more troublesome problem has centered around the deterioration of mass transportation facilities in the Commonwealth.

Repeatedly, I have had to appear before the Department of Public Utilities to protest cuts in railroad passenger service. This problem continues to be one of the major obstacles to metropolitan growth in Massachusetts.

One of the areas where I have had to take increasing action has been that concerned with the so-called "Old Colony option." The option granted to the Commonwealth in the New Haven reorganization proceedings was to have expired on August 15, 1959. As a result of the inability of the State and the railroad to agree to an extension of rights, I recommended that the State proceed to exercise its rights. On August 13, 1959, a bill was enacted authorizing the State to exercise its rights and notification was sent to the railroad.

On August 14, 1959, I presented a report to the Federal District Court in New Haven asking that our exercise of the option be approved. The court approved the exercise contingent upon our enacting further legislation spelling out the facilities required and providing for payment of the salvage price set in the option to the railroad.

Numerous questions arose concerning the Commonwealth's rights in the property and the geographic boundaries of the property subject to option. This required many appearances at hearings in New Haven with lengthy trials.

At the same time, the Boston Terminal Company attempted to sell the South Station. In behalf of the Commonwealth, I entered my appearance in opposition to the attempted sale as being against the public interest.

The majority of these problems continued into the next fiscal year.

Antitrust.

My office was very active in the antitrust field. Some eighteen corporations in the bituminous and asphalt industry were indicted by the Federal Grand Jury for allegedly rigging bids and fixing prices in the sale of road materials to the State and cities, towns and counties of Massachusetts. I appeared in the United States District Court in Boston to oppose the acceptance of a plea of "nolo contendere" in these cases. I pointed out to the court that acceptance of a "nolo" plea would deprive the Commonwealth of Massachusetts and its political subdivisions of substantial rights provided for a treble damage litigant under the Sherman Antitrust Act. I also opposed the acceptance of a consent decree by the Justice Department in the Federal Government civil cases against the eighteen corpora-

tions because, like a plea of "nolo contendere," consent decrees prevent the treble damage litigant from obtaining a prima facie case against the defendant. Subsequently, I met with the Justice Department and was successful in persuading the Antitrust Division to refuse to accept such consent decrees, and in April, 1960, I filed antitrust suits for treble damages of several millions of dollars against the eighteen separate corporations on behalf of the Commonwealth of Massachusetts and the cities and towns in Massachusetts.

Consumer Frauds.

Activities of the Division of Consumer Counsel in the field of consumer fraud increased considerably over the previous year. Every day my office received complaints from irate citizens who felt that they had been cheated in some business transaction. Many of these complaints involved strictly civil matters between the parties wherein no fraud or violation of law was involved, and in these cases the consumers were advised to seek private counsel. However, in many of these cases my Division of Consumer Counsel made diligent efforts to affect a compromise between the parties with a great deal of success. In a number of cases in disputes between customers and dealer over the quality of work performed, we have been able to intercede and effect a mutually agreeable compromise.

In two cases my office acted against firms for violations of law. One particularly bad case involved an aluminum siding company which advertised side wall work at a price which was clearly impossible to substantiate. When a customer called with reference to the particular advertisement, the salesman would call at the home and convince the customer that he should sign a contract at a much higher price. This is the type of bait advertising which the Division of Consumer Counsel is attempting to stamp out.

In another case the Division of Consumer Counsel took court action against an automobile dealer who was engaged in a violation of our "endless chain statute." This company was selling cars under an agreement with the buyer that he would be paid a bonus for every new customer he produced with the provision that he could pay off the full amount of the car in this manner.

In the field of legislation the Advisory Consumer Council sponsored a bill to give buyers an opportunity to defend on frauds. We had discovered that one of the grave problems in consumer fraud cases was the ease with which the sellers could discount their contracts with finance companies, leaving the buyer without the opportunity to avail himself of the defense of fraud. Under this bill sponsored by the Consumer Council the buyer would have available to him the defense of fraud against any subsequent holders of his note.

The Consumer Council also sponsored a bill which would require anyone engaged in the business of extending credit to furnish to each person to whom such credit is extended prior to the consummation of the transaction a clear statement in writing (1) setting forth the total of the finance charges

to be borne by such person in connection with such extension of credit, and (2) stating the percentage that such amount bears to the unpaid balance expressed in terms of simple annual interest.

During the year, the Division of Consumer Counsel sponsored a forum on "Bait Advertising" at which a number of representatives of business organizations met with consumer groups and discussed the avenues whereby such unethical practices could be terminated or corrected.

In March, 1960, I participated in a national conference on Consumer and Investor Protection, sponsored in Washington by the United States Department of Justice. As a result of our program of Consumer protection in Massachusetts, the Attorneys General of several other States have now seen fit to set up similar Divisions of Consumer Counsel in their departments.

Division of Civil Rights and Liberties.

One of the most important and far-reaching projects undertaken by the division was the compilation and distribution of the pamphlet "If You Are Arrested." This publication, which was issued as a public service in cooperation with the Boston Bar Association and the Civil Liberties Union of Massachusetts, is a highly effective summary of citizens' rights and the rights of the Commonwealth. It covers the acts of arrest, rights in the police station, rights in court, and the ways a detained person can get help. It was prepared with meticulous care, with the aid of judges, criminal lawyers, law school deans, editors, journalists, police officials, and civic organization executives. It has been widely hailed by scores of newspapers not only throughout Massachusetts but the entire country. Said *The Boston Herald:*

"It should be required reading in our high schools. It should be made available by the police to every person arrested in the Commonwealth."

Now in its third printing, the pamphlet has been distributed to over 50,000 people, and there is presently a waiting list of 200,000. Radio Free Europe has used it. The National Better Business Bureau has reprinted the publication and has distributed it nationally, and six other States have adapted it for their own purposes. Copies may be obtained free of charge on request to the office of the Attorney General.

The division has been vitally concerned with introducing and supporting Civil Liberties legislation. The Attorney General, with the co-operation of Suffolk District Attorney Garrett H. Byrne, and the Massachusetts Police Chiefs Association, was instrumental in securing legislation which helped to curb abuses of unrestricted wire tapping, yet did not interfere with effective law enforcement. The Attorney General also sponsored with the co-operation of Suffolk County District Attorney Byrne, legislation permitting persons arrested on a felony the right to use a telephone to communicate with relatives, friends, or attorneys. Previously this right had been restricted only to those held for misdemeanor violations. And it was mainly through the efforts of this office that the law was finally enacted

providing representation for indigent defendants in criminal cases — a truly major realization of equal justice under the law irrespective of economic circumstances.

Massachusetts enjoys the most comprehensive set of laws outlawing discrimination because of race, creed, color and national origin, of any State in the Union. These laws apply to discrimination in employment, public housing, most types of private housing, public accommodations, education admissions, and age. The law is administered by the Massachusetts State Commission Against Discrimination, and the Division of Civil Rights and Liberties, since its establishment, has been counsel for the commission.

Last year, at the request of the commission, the Attorney General rendered an historic opinion, which has since become a national landmark, which holds that real estate brokers' offices are places of public accommodation and hence do not have the luxury to discriminate against our citizens. The division has assisted the commission in processing a number of complaints against large real estate developers, with far-reaching consequences which have been largely reported in the press throughout the nation. Negroes who have been persecuted by vandals and social malcontents after moving into previously all-white neighborhoods have successfully sought and received the aid of the division. One culprit was successfully prosecuted and jailed.

In order to improve the administration of justice at the administrative level and to furnish a statutory foundation for fairness, clarity, simplicity and some degree of uniformity, the Division of Civil Rights and Liberties, in cooperation with the Boston Bar Association and the Legislative Research Bureau, is making a long-range study of the laws governing these agencies. The study is intended to assure that the public will have reasonable access to administrative rules and regulations so that any interested person can find out just what conduct is expected of him. The importance and fairness of such opportunity are underlined by the fact that the penalty for violations of these rules is often criminal and is almost always serious in nature. The study is also intended to show that persons required to deal with the particular administrative agency will be able to find out what the proceedings of that agency are so that they can abide by and utilize them. Many of these procedures are now so complex and little-known that even a lawyer is likely to be in the dark about them unless he has become a specialist.

When Massachusetts municipal police officials on a number of occasions sought to interfere with the right of students to engage in peaceful picketing in sympathy with the lunch-counter sit-downs in the South, in a memorandum prepared by the division, the Attorney General advised the officials that such interference is almost invariably illegal and unconstitutional. He pointed out that picketing, so long as it is peaceful and not coercive, is an expression of opinion under the First Amendment which has been held lawful by the United States Supreme Court. As a result, interference by officials ceased, and the picketing was allowed to continue unmolested.

In the matter of religious freedom, the division has also been active. One of the most far-reaching matters has concerned the rights of Mohammedan

prisoners in the State Penal System. The office has worked with the Department of Correction to see that the religious freedom of these prisoners is protected, consistent with administrative efficiency and prison security. Finally, the office was instrumental in having the infamous cage at Norfolk Superior Court removed, and in having the Sheriff of Middlesex County undertake to do likewise with the cage in the Cambridge Superior Court. This marks the beginning of the end of a situation in which Massachusetts, alone among the fifty States and the Federal jurisdiction, countenances the medieval and barbaric practice of obliging unbailed defendants to sit in cages during trial, while their bailed counterparts sit in chairs in the court room. The favorable editorial comment on the removal of the cages was intense, and was widely noted nationally.

Criminal Division.

The Criminal Division continued its effective work in the field of criminal investigation and in answering complaints and requests for assistance from local enforcement officers as well as requests from law enforcement officers of the Federal Government and other States.

With the co-operation of the State and local police and the Federal Bureau of Investigation many investigations and prosecutions were conducted. Some investigations had interstate ramifications. The more significant cases handled by my office are:

Tri-County Murder Investigation. My office was involved in co-ordinating the investigation of the murders of Gaetana J. DiNicola, alias Joe "Kiki" Cuyler and Angelo DeMarco. Involved in this investigation were the District Attorneys of Middlesex, Worcester and Berkshire Counties, as well as the police chiefs of Framingham, Worcester and State Police officials and detectives. The investigation extended over a three-month period. Witnesses were interviewed in Boston, Cambridge, Worcester and Springfield. As a result of the investigation, raids were made in Springfield breaking up a million dollar gambling syndicate with ramifications in many cities and States. The probe of the murder extended not only beyond county lines but also across State lines into Connecticut, Rhode Island and New York. The record of telephone calls investigated indicated a connection with persons engaged in criminal activity from Canada in the North to Miami in the South and across country to Indianapolis and Chicago.

Taunton Municipal Lighting Plant Case. As a result of an investigation by my office, indictments were returned against certain individuals involved in the administration of the Taunton Municipal Lighting Plant. The criminal case which was presented to the Grand Jury by an Assistant Attorney General is now pending in the Supreme Judicial Court.

Indictments were returned for the crimes of soliciting presents or gratuities from contractors, embezzlement of public funds as city officers, refusal and neglect to account for public funds, noncompliance with the public bidding act for contracts for public building and acceptance of gratuities from a contractor. In addition to the criminal aspects of the

case, the investigation disclosed glaring deficiencies in the statutes which precluded prosecution of many aspects of improper conduct by public officials. There was a lack of legal safeguards to protect the public interest in the handling of large amounts of public funds by municipal light commissions. Consequently, I introduced legislation advocating the following five major proposals covering so-called "conflict of interest" situations: (1) that contracts involving over $1,000 be accompanied by a bond, (2) that commissioners furnish to the city clerk and city auditor a copy of every contract, (3) that contracts for the purchase of equipment, supplies and materials in an amount of $1,000 or more be open to public bid, (4) granting the appointing authority the power of removal for cause, and (5) that records and contracts of the commission be made a public record. I appeared before the Legislative Committee on Power and Light to urge the enactment of these proposals.

Doris E. Rablin Case. On October 5, 1959, indictments were returned against Doris E. Rablin, alias Doris E. Barrett, for larceny and embezzlement by a trustee. The case was investigated and prosecuted by my office by an Assistant Attorney General and a Special Assistant Attorney General. The case involved an approximate shortage of $14,000 in the funds of the Prospect Hill Cemetery Association, Inc. The defendant who was an official of said Prospect Hill Cemetery Association, Inc., was found guilty on six indictments.

Obscene Literature. Studies by criminologists as well as experience of the police, clergy and prosecutors have revealed that an increasing number of so-called sex crimes and crimes of violence are traceable to obscene literature of a puerile or sadistic nature. Active co-operation between this office and local law enforcement agencies has resulted in many prosecutions. Since the problem is one of education as well as law enforcement, an Assistant Attorney General has been assigned to lecture to civic groups on the nature of this evil, what steps are being taken to combat it, as well as what each citizen can do to help fight this type of crime. In addition, the Obscene Literature Control Commission, created under G. L. c. 6, § 101, has had numerous meetings in my office. My staff has provided secretarial, clerical and such other services as was necessary for the function of said commission. In addition, through my efforts there was organized a State Police Pornographic Bureau.

Report of the Criminal Laws Passed During the Legislative Session. In accordance with G. L. c. 12, § 6A, a digest of all new laws was prepared, printed and distributed to sheriffs and local law enforcement officials. In addition, this department had referred to it many requests for legal opinions from State agencies involved in law enforcement activities. Requests were received from the Department of Corrections, the Department of Public Safety and other related law enforcement activities too numerous to mention. These opinions were drafted by my Criminal Division after extensive legal research.

Gaming Activities. In addition to the investigation and prosecutions arising from the Tri-County Murder Investigation referred to previously, investigations were carried out and interstate information exchanged with

other States which resulted in many prosecutions. Various methods have been used to proceed against gaming operators. One successful method has been to discontinue phone service to the alleged gaming operator. My office has been successful before the courts in upholding telephone service discontinuances. Another method is to proceed against the gaming operator for income tax evasion. In the case of Edward G. Bowler, the Commonwealth received $20,000 as a result of a stipulation in the case of *United States* v. *Bowler*, in the Federal District Court for Massachusetts. This case is typical of the co-operation between State and Federal officials, because the original seizure of $160,000 was made by State Police in the apartment of the defendant. After this seizure, claims by both the United States and the Commonwealth were made and collected.

Narcotics and Harmful Drugs. One of the most nefarious types of crime is the peddling and use of narcotics and other harmful drugs and barbiturates often called "tranquilizers." The abuse of these drugs has been a serious menace to public health and safety.

With respect to the narcotics problem I sponsored a seminar on July 17, 1959, on "Narcotics and Harmful Drugs" at the Museum of Science. The seminar was attended by various police, district attorneys, attorneys and medical men. The complex aspects of the problem were taken up with particular reference to addicts and police problems by outstanding authorities in the field. Participating in this seminar were Inspector Carey, Commanding Officer, Narcotics Bureau, Police Department, City of New York; Wayland L. Speor, Assistant to the Commissioner of Narcotics, U. S. Treasury Department, Bureau of Narcotics; George Michaels, Director of Food and Drug Division, Public Health Department of Massachusetts; and Dr. Alfred Frechette, Commissioner of Public Health, Massachusetts. I am pleased to report that we have been advised by Federal agencies that the problem of narcotics in Massachusetts is very minor and well under control. My objective is to keep the problem under control in the Commonwealth by widespread dissemination of information on the various aspects of narcotics as well as speedy action and investigation of cases when they arise.

As to the abuse of "tranquilizers," many highway deaths and juvenile crime can be traced to the use of these drugs. I am happy to report that because of widespread information, the number of highway deaths traceable to barbiturates is declining.

Anti-Trust Cases. In an unprecedented action in this Commonwealth my office took part in anti-trust proceedings against defendants under the Clayton Anti-Trust Act. It is the first time that any State has sought to take part in a substantial anti-trust case. My office is proceeding in independent civil proceedings in the United States District Court for Massachusetts under section 5 of said Clayton Act for treble damages arising out of an alleged conspiracy to fix prices, rig bids, and suppress competition in the sale of asphalt, tar and bituminous concrete to the Commonwealth and its subdivisions including cities and towns. The case involves eighteen corporate defendants, fourteen of which have a usual place of business in Massachusetts. The case is of overwhelming importance because said de-

fendants are among the principal suppliers of tar, asphalt and bituminous concrete to the Commonwealth for road building purposes.

Racing Commission Cases. My office represented the State Racing Commission in several cases wherein the acts of said commission in granting licenses were reviewed by the Superior and Supreme Judicial Court. The most significant case was *Bay State Harness and Breeding Association, Inc.* v. *State Racing Commission, et al.*, 340 Mass. 776, wherein the court denied relief against said commission after said commission had granted a license for twenty-three nights of harness racing in 1959 to the Eastern Racing Association, Inc., thereby limiting the petitioner to sixty-seven nights of racing.

Extraordinary Writs and Similar Matters; Renditions; Pardon Recommendations. The great bulk of the duties of the Criminal Division is taken up with representing the Commonwealth in various proceedings in the courts as well as investigating and prosecuting work. A brief statistical table of its activities in such matters is as follows:

Defective Delinquent Cases:	
(Includes petitions for release in probate court, petitions for release in the Supreme Court, and habeas corpus petitions in the superior court)	8
Petitions to be Adjudged Sane	4
Writs of Error	24
Writs of Mandamus	2
Writs of Habeas Corpus:	
(Superior Court, Supreme Court)	6
Petitions for Discharge	4
Writs of Certiorari	2
Bills for Declaratory Judgment	3
Writs of Mandamus (Tax Case)	1
Petitions for Review (Racing Commission)	3
Gaming Cases	3
Petition for Failure to File Inventory	1
Pardon Petitions Recommended upon	80
Rendition Cases:	
(This figure includes requests *from* other States and requests by us *to* other States)	116

Division of Public Charities.

At the inception of my administration, a program was inaugurated to improve the operation of the Division of Public Charities within the Department of the Attorney General.

Highlighting this program was a state-wide probe of "Charitable Trusts" conducted throughout the Commonwealth. Assistants in the Attorney General's office were sent to the probate registries in Barnstable, Plymouth, Taunton, Salem, Cambridge and Greenfield. These men conducted a complete survey and check of every record of every trust on file in each of the six counties involved in the initial phase of this probe.

As a result of this sweeping investigation more than $5,000,000 of chari-

table funds were uncovered and proceedings taken to put these funds to use. In Barnstable County, a petition was filed with the co-operation of the town of Barnstable for permission for the town to use the excess of the income of the million and one half dollar Kirkman fund for charitable purposes. In Plymouth County a million dollars, earmarked for the benefit of crippled children, was uncovered. And as a result of a petition filed by the Attorney General, a new "board of trustees" was appointed to put these funds to use for the benefit of crippled children. In Essex County, a million and one quarter dollars was, upon petition of the Attorney General, freed to be used for scholarships for students of Marblehead and Swampscott High Schools for medical training and art study.

The division has participated in the establishment of new trust funds for charitable purposes including the estate of Harold Whitworth Pierce consisting of six million dollars bequeathed for charitable purposes, the "Valley Charitable Trust" consisting of one half million dollars established by the Valley Bank and Trust Company in Springfield, and one half million dollars to the Frank Wood Memorial Home and the Arthur T. Nelson Memorial fund.

The Division also spearheaded proceedings to put to use one hundred eighty-five thousand dollars of a trust fund created in 1919 for the "Defenders of Public Safety." As a result of the efforts of the Attorney General, persons entitled to these funds will have an opportunity to receive assistance.

The division was also of help to various charitable and governmental agencies. In Essex County the division was successful in preventing the trustees of the estate of David Smith from retaking the Rowley Town Hall.

In Middlesex County, the division successfully defended a petition brought by the heirs of Mary D. B. Hooper to terminate her trust established for the care of aged Protestant couples in Cohasset.

In Hampden County, the division intervened in an effort to allow the Ludlow Hospital to conform to the requirements of the Department of Public Health. This action played a part in allowing the hospital to remain open.

In Barnstable County, the division used its offices to help the Wampanong Indians in Mashpee to save their church, a 275 year old structure which is the first Indian church in the United States.

In Suffolk County, the division assisted the city of Chelsea in freeing cemetery funds for the perpetual care of graves in the Chelsea Cemetery.

The division was also successful in preventing termination of the trust fund established by Benjamin Franklin.

During the course of the past two years, the division investigated many cases of charitable frauds and mismanagement of charitable funds. In Nantucket County, the division uncovered an embezzlement of the perpetual care funds of the Prospect Hill Cemetery Association, and the matter was referred to the Criminal Division which successfully prosecuted indictments for larceny.

An attempt to solicit funds by a bogus organization going under the name of "State Inspectors-Commonwealth of Massachusetts" was stopped by the action of the division.

The division's policy of greater and more efficient supervision of charities was implemented by complete revision of existing procedures.

During the year the Division of Public Charities has continued its activities and efforts in obtaining the use of dormant charitable funds for the benefit of the citizens of this Commonwealth.

As a result of the revision of the reporting Form 12, we have received much more detailed financial reports. Two thousand two hundred and fifty-two charitable associations, organizations, and corporations filed reports with the division during the year, and the filing fees obtained amounted to $6,756.

Since this is perhaps only a small fraction of the charities which should be filing with this office, a letter was prepared and mailed to all city and town solicitors asking for lists of charitable organizations within the confines of their particular communities. Letters were also mailed to the clerk of every city and town for a copy of the annual financial report of said city or town in order to secure some idea as to the number of restricted funds which are being administered by them. The statute is not quite clear as to whether cities or towns having such restricted funds for management should report to the Attorney General's office. An interesting fund being held by the city of Newton came to our attention as a result of our survey, namely, that known as the Horace Cousens Industrial Funds, which is over a million dollars and its principal use is for mortgage loans to people settling in the city of Newton. There are many funds such as this which should be given wide publicity so that they might come to the notice of those citizens who might benefit therefrom.

The division also supervises the estates handled by public administrators. Many petitions involving the appointment of public administrators, receivers, etc., the allowance of their accounts, and petitions for sale of assets of estates of individuals leaving no heirs, were reviewed by the personnel of the Division of Public Charities during the year. During the past fiscal year $55,079 escheated to the Commonwealth from these estates.

Great emphasis was placed upon checking on accounts of trustees to determine whether all the income derived from charitable trusts was used for the charitable purpose. Many cases were found where for some reason the income could not or was not used for the charitable purpose and was simply kept on deposit in a commercial account. This was called to the attention of the trustees, and invariably some disposition was made of the income. For example, the Charles G. Pringle Foundation kept an income balance of $24,534.24 out of a $265,000 trust fund for the benefit of the inhabitants of Lawrence, in a commercial account. When this matter was called to the attention of the trustees, $17,000 was immediately distributed for the benefit of the people of Lawrence. The trustees stated that they have "deemed it advisable, however, to allow unexpended income to ac-

cumulate over a period of years to cover unexpected situations which might arise such as a flood similar to that which occurred in 1938 or 1939 doing great damage and rendering families homeless, or an emergency such as a disastrous fire rendering families homeless without any furniture."

In summation, under my administration, the Division of Public Charities within the Department of the Attorney General has been recognized throughout the country as the leading State agency in the effective and efficient supervision of charitable funds. Through the intensive efforts of the department, more than five million dollars in dormant funds have been put to use; over a million dollars in inactive funds have been activated; and the rights of the public in the more than five billion dollars devoted to charitable purposes in the Commonwealth have been protected and those found to be mishandling such funds have been promptly dealt with.

Town By-Laws.

Approximately six hundred and fifty by-laws were submitted to this office by over two hundred towns for action under the provisions of G. L. c. 40, § 32. Relatively few were disapproved. It is interesting to note that zoning by-laws now constitute the bulk of those submitted. This necessarily requires an examination of each by-law in order that we may determine if the adoption complied with the provisions of the zoning enabling act, G. L. c. 40A. Almost without exception the few disapprovals of zoning by-laws are occasioned because of failure of the planning board to give proper notice of their hearing on the proposed changes.

General Laws c. 40A, § 6, as amended in the 1959 session of the General Court, requires two public notices, the first being not less than twenty-one days before the day of the planning board hearing. For some reason this provision is often overlooked and the notice is defective either because the twenty-one days required was not complied with or only one such notice was published. When that is the case this office is constrained to disapprove.

The municipal division has continued to successfully expedite the processing of these by-laws when submitted.

Prudential Center.

Early in 1960 it was brought to my attention that the Prudential Insurance Company was definitely considering abandoning its projected, and in fact then rather substantially already initiated, development in Boston's Back Bay. The contemplated project envisioned a planned development of some thirty acres in the heart of the Back Bay with buildings of such design and with such surrounding areas as to benefit not only the immediate area but the whole city. The construction of the buildings planned to be erected involved the employment of thousands of local skilled and unskilled workmen as well as purchases of goods and services in Massachusetts totalling millions of dollars. In addition, the completed project was to include buildings for housing a regional office of the Pru-

dential Insurance Company in which thousands of office workers would be employed.

The abandonment of such a project would have been a major tragedy not only to Boston but to the Commonwealth, and I determined to do everything in my power to avert such a tragedy and to bring the project with its benefits to fruition. I arranged for meetings at my office at the State House with representatives of the Company, members of my staff, State legislative and State and city executive officials to consider possible solutions to make the way clear for the company to go on with the project. After much thought and work by my staff, the company representatives and the legislative and executive officials, a plan was prepared and, with the assistance of the leaders and members of the Legislature and the Governor, was presented to the Legislature, and by the Legislature to the Supreme Judicial Court. The court in an opinion which was one not only of great legal learning but, more than that, was of great judicial statesmanship, went into the whole problem and outlined a course of acceptable procedure which could be followed so that the Prudential's Back Bay development could be carried on to completion.

The newspapers, civic and business leaders and company officials were most generous in according to me a large measure of credit for initiating the measures taken to save the huge project for Boston. While I certainly did everything I possibly could as Attorney General, as an elected constitutional officer of the Commonwealth and as a citizen to save the project, I would like to make it clear that final success was due to the co-operation of all the officials concerned, and the measures initiated could not have succeeded had it not been for the whole-hearted efforts of the President of the Senate, the Speaker of the House, the members of the House and Senate, the Governor, Mayor of Boston and Supreme Judicial Court.

Senatorial and Councillor Redistricting Test Cases.

Proceedings seeking to set aside the redistricting of senatorial and councillor districts, adopted by the Legislature by chapter 432 of the Acts of 1960, were brought in the Supreme Judicial Court. The Attorney General answered alleging the validity of the redistricting and made arrangements to have agreements entered into as to the material facts and to have the cases reported to the Supreme Judicial Court for the Commonwealth. That court sustained the validity of the legislation on all points. *Lamson* v. *Secretary of the Commonwealth*, 341 Mass. 264.

After the decision of the Supreme Judicial Court and before the State election, the Attorney General co-operated with the city officials of Newton in having a statute enacted to solve a problem the election officials of that city were facing in conducting the State election because of the fact that parts of three of the city's new voting precincts were in different districts for electing representatives than the other parts of the precincts. Under the legislation enacted each of these areas was made a separate precinct and the city officials were enabled to conduct the election without any difficulty. (See St. 1960, c. 587.)

Mount Greylock State Reservation and Tramway Authority.

The Legislature by St. 1959, c. 608, legislated with reference to the Mount Greylock State Reservation and also amended the provisions of the Mount Greylock Tramway Authority Act to provide for a guarantee by the Commonwealth of the payment of interest on the bonds of the Authority and for borrowings by the Commonwealth to raise funds to make payments under the guarantee.

A petition for a referendum on the act was filed, which was found to be defective in form and in proceedings brought seeking to sustain the validity of the referendum petition the Supreme Judicial Court for the Commonwealth ruled that the petition was not in proper form in that the circulator's affidavit required by G. L. c. 53, § 22B, did not appear thereon. *Newman* v. *Secretary of the Commonwealth*, 339 Mass. 749.

A petition for a declaratory judgment was also brought seeking to invalidate the 1959 act on the ground that it authorized the borrowing of money by the Commonwealth but had not been enacted in the manner required by the Constitution. In defending the proceedings it was pointed out that the act did more than authorize the borrowing of money, it also legislated with regard to the Mount Greylock State Reservation and provided that the Commonwealth guaranteed the payment of interest on the bonds of the Tramway Authority, and it was argued that those provisions were separable and were validly enacted even if the borrowing provisions had not been properly enacted. The Supreme Judicial Court for the Commonwealth did not hold the entire act to be invalid. The court held only that the borrowing provisions had not been properly enacted. *Singleton* v. *Treasurer & Receiver General*, 340 Mass. 646.

Division of Employment Security.

During the fiscal year a total of 499 cases required the attention of the Assistant Attorneys General assigned to the division. Employers who failed to pay their employment security taxes accounted for 397 of these cases. Ninety-eight cases involved fraud on the part of claimants who collected unemployment benefits illegally, and four cases were entered in the Supreme Judicial Court on appeal from decisions rendered by the Board of Review in the agency.

With respect to employers who were delinquent in making payment of taxes, before proceeding with criminal action numerous letters were sent and repeated warnings given. After all methods had been exhausted and every opportunity given, and the employers still neglected to make payment, it then became necessary to enforce payment through an active program conducted under the provisions of G. L. c. 151A, § 47. This involved the issuance of 341 criminal complaints against forty-four employers. Findings of guilty were entered against the employers; and the court imposed jail sentences or ordered the defendants to make full payment of the taxes owed. This program resulted in substantial sums of money being obtained for the Commonwealth which could not otherwise have been recovered.

Of the four cases in the Supreme Judicial Court, decisions were handed down by the court in favor of the Commonwealth in the following cases:

1. *Western Electric Co., Inc.* v. *Director of the Division of Employment Security*, 340 Mass. 190.

2. *Francis H. Conley* v. *Director of the Division of Employment Security*, 340 Mass. 315.

3. *Frank A. Meyers* v. *Director of the Division of Employment Security*, 341 Mass. 79.

One case is still pending.

A total of 175 cases of all types was disposed of during the year, and as of June 30, 1960, the inventory of cases numbered 324. The sum of $104,839.34 was collected during the year; of this amount, $99,940.34 was paid by delinquent employers, and $4,899 was recovered on unemployment benefits collected fraudulently.

Contributory Retirement Appeal Board.

Under the provisions of G. L. c. 32, § 16, an Assistant Attorney General is designated by me to sit with a designee of the Commissioner of Corporations and Taxation and a designee of the Commissioner of Insurance. The board, thus formed, has the important obligation of adjudicating appeals by the members of the various contributory retirement systems from decisions of local retirement boards. The board meets once each week to hear appeals, the greater portion of which deal with applications concerning either accidental disability benefits or accidental death benefits. Since, even now, legal precedents are sparse in this field, a great burden is placed upon the members to weigh the evidence carefully and deal fairly with the parties.

Much time is devoted to hearing the appeals and for arriving at decisions which will withstand legal attack. The importance and difficulty of the cases justify setting up a more formal board, with administrative and clerical help, permanent quarters and personnel.

Approximately forty appeals were heard during this period. During the year cases involving three legal principles as to retirement ruled on by the board were decided by the Supreme Judicial Court for the Commonwealth, the views of the board being sustained except as to one of them.

The citizens of the Commonwealth underwrite the various public retirement systems and this fact is kept in mind in all deliberations of the board.

Insurance Matters.

Following a complaint by the Commissioner of Insurance, and after joint investigation by my office and the Division of Insurance concerning the financial affairs of a foreign insurance company licensed to write motor vehicle liability policies and bonds in the Commonwealth, I determined that the best interests of the policyholders of the company required immediate action. Accordingly, I filed a bill in equity in the Superior Court against the American Fidelity & Casualty Co., Inc., a corporation or-

ganized under the laws of Virginia, and trusteed all its funds in the Commonwealth. This action was necessary to prevent the company from withdrawing its assets and leaving policyholders and claimants unprotected. Subsequent to the institution of suit, many conferences were held by this office and the Commissioner of Insurance with representatives and attorneys of the company with a view to resolving the difficulties and protecting the rights of policyholders and claimants. My position was that Massachusetts policyholders and claimants must be given the utmost protection. Receivership was to be avoided, if at all possible, because it would leave Massachusetts policyholders of the company without effective coverage for the balance of the policy year after they had paid their full premiums, and would require them to obtain new policies for the balance of the calendar year 1959 at long-term rates.

With the active co-operation of the Insurance Commissioner, I finally suggested and worked out the following plan. American Fidelity funds which had been trusteed were put under the effective control of trustees and were to remain under such control until April 1, 1960, or until such time as the company could solve its financial difficulties. In addition, I insisted that American Fidelity continue to process and pay claims in the normal course of business, using funds outside the Commonwealth. The trusteed funds were not permitted to be used for the payment of Massachusetts claims. Subsequently, the company straightened out its financial difficulties and the bill in equity was not further pursued. This solution gave full protection to all claimants and policyholders of the company in the Commonwealth.

On March 2, 1960, the Supreme Judicial Court decided *Liberty Mutual Fire Insurance Co.* v. *Commissioner of Insurance*, 340 Mass. 413. The litigation involved the interpretation of the word "deviation" as contained in G. L. c. 174A, known as the fire, marine and inland marine rate regulatory law. The court decided that the word "deviation," as employed in the statute, was synonymous with "variation" and ordered the Commissioner of Insurance to hold further hearings on the application of Liberty Mutual for a deviation from certain windstorm insurance rates, rules and schedules filed by the New England Fire Insurance Rating Association. The effect of the decision is that an insurance company which is a subscriber to a fire rating organization can now avail itself of the uniform rates filed by the rating organization and at the same time seek a deviation from the same uniform rates, putting it in the position of offering two rates for the same kind of coverage.

This was a case of first impression in the United States, construing the meaning of the word "deviation," although chapter 174A, the fire rate regulatory law, so called, is a uniform law in effect in a number of States.

Land Title Cases.

The Attorney General's office is charged with the duty of protecting the rights of the Commonwealth in the lands owned by the Commonwealth and in lands owned by private individuals where public rights are concerned.

This includes the protection of public rights in the great ponds and in the tidewaters of the Commonwealth. An Assistant Attorney General sits in on all hearings of petitions pertaining to the establishment of access to great ponds.

During the year 185 Land Court cases were processed.

In all cases where land has been taken in eminent domain proceedings and a settlement is made to the owner of the land because of such taking, the title abstract is reviewed to make certain that the individual who receives the payment is the rightful owner, that he is entitled to the damages awarded, and that all outstanding encumbrances, municipal liens and inheritance taxes have been paid.

During the current fiscal year approximately 800 eminent domain case agreements were processed.

In addition to the above, all deeds conveying title to land owned by the Commonwealth and all deeds, leases and easements conveying property and property rights to the Commonwealth were checked as to form and title.

Tort Cases.

Under G. L. c. 12, § 3B, the Attorney General defends State employees operating State-owned motor vehicles in the course of their employment. The Attorney General may adjust or settle any such action at any time — before, during or after trial — in an amount not greater than $10,000 on account of injury to or death of one person, and not exceeding $5,000 on account of damage to property. It may be noted here that the annual expenditure for these claims approximates $90,000. There are approximately 4,000 State-owned motor vehicles in operation at the present time.

The Attorney General, in addition to the motor tort cases, defends the Commonwealth in the matter of highway defects (c. 81, § 18).

Workmen's Compensation Division.

During the year the Workmen's Compensation Division received 6,124 First Reports of Injury. This resulted in 810 agreements for compensation being submitted for approval. Seven hundred and eighty-eight agreements were approved for payment and twenty-two were held for further investigation, further medical reports, etc.

Payments made by the Commonwealth to injured employees totaled as follows:

For Compensation	$778,597.09
Medical Payments to Doctors	149,263.37
Hospital Payments	147,108.55
	$1,074,969.01

Under G. L. c. 152, § 65, this office collected $5,850 in non-dependent death cases. The balance on hand at the beginning of the fiscal year in the special fund under said section was $46,696.23, making the total amount

of funds available $52,546.23. Payments out of this fund on insurer's petitions brought under G. L. c. 152, § 37, for fifty per cent reimbursement of payments for further disability resulting from a subsequent injury totaled $31,676.83, leaving a balance on hand at the end of the fiscal year of $20,969.40.

Under G. L. c. 152, § 65N, requiring payments into a special fund in all death cases, this office collected $80,275 during the year. The balance on hand in the fund at the beginning of the fiscal year was $365,938.52, making the total amount of funds available $446,213.52. Payments out of this fund on insurer's petitions brought under G. L. c. 152, § 37A, for partial reimbursement for payments made to disabled war veterans receiving injuries totaled $72,629.52 leaving a balance on hand of $373,584.

The Workmen's Compensation Division of the Attorney General's office represented the Commonwealth on 297 hearings and conferences before the Industrial Accident Board involving State employees' cases, hearings and conferences on §§ 65 and 65N cases involving insurers, and on petitions under §§ 37 and 37A brought by insurers.

Veterans.

The volume of business handled by the Veterans' Division increased slightly over the previous year. The division is staffed with personnel especially equipped to handle every conceivable type of legal problem involving or affecting veterans and their dependents. The division continues to function efficiently in furnishing legal advice to thousands of veterans who appear in person or write the office of the Attorney General.

The volume of veterans' legislation and the countless amendments thereto are often confusing not only to veterans but to public officials who deal with veterans and their rights. Many times a telephone call may be sufficient to clear up any confusion that exists. More often, a personal interview is required to elicit all the pertinent facts on which sensible and proper legal advice can be based.

I have directed the personnel of the division to give special attention and extra prompt service to disabled and hospitalized veterans who are limited to making written inquiry regarding their problems. This attention and service is also furnished to members of the armed forces of the United States who are on active duty.

Overall, the tempo of the Veterans' Division is geared to quick and efficient service. In many cases, the veteran or his dependents come to the office at the last minute; sometimes they come too late, having wasted valuable time in exhausting all other remedies and services. We urge veterans' organizations and public officials to advertise the services offered by the division. We are available to help and advise veterans and their dependents as to legal problems. We can best fulfill our function if they come to us before it is too late.

The work load of the division shows that it continues to serve an indispensable function.

Collections.

Collections for the year totalled $113,439.15. Listed below is a breakdown for each department:

Mental Health	63	$84,442.98
Public Works	141	19,185.42
Metropolitan District Commission	28	5,461.42
Public Health	12	2,516.57
Natural Resources	8	326.17
Agriculture	1	13.50
Education	12	277.85
Labor and Industry	1	184.35
Public Safety	1	153.13
Public Welfare	2	65.50
Treasury Department	4	43.46
Correction	2	441.98
Massachusetts Port Authority	1	241.32
Registry of Motor Vehicles	1	76.10
Youth Service Board	1	9.40
	278	$113,439.15

Springfield Office.

The Springfield office of the Department of the Attorney General, located at 95 State Street, Springfield, Hampden County, Massachusetts, is staffed by a secretary, two assistants and one State police officer.

A member of the Springfield staff covered all hearings conducted in Springfield by the Motor Vehicles Insurance Appeal Board. The Springfield hearings cover all appeals in the four Western counties.

The Springfield staff handled, either by trial or settlement, all eminent domain cases arising in the four Western counties.

Hearings before the Workmen's Compensation Board were covered by a member of the Springfield staff, as they were assigned to it by the Boston office.

Contract actions or suits in equity that were brought against the Commonwealth or its various agencies were either defended by a member of the Springfield staff, or in a number of cases, were presented in behalf of the Commonwealth, by a member of the Springfield staff.

Actions were brought by this office to recover funds for the Department of Mental Health, the Department of Agriculture, and any other agencies requesting this service.

The Springfield office worked in conjunction with the district attorneys in the four Western counties of Massachusetts on various criminal matters, and also rendered service to various city solicitors and town counsels, with respect to legal rulings requested by said persons. All criminal investigations arising in the four Western counties were handled by the State police officer assigned to the Springfield staff.

Many citizens and officials of the Western communities requesting vari-

ous services were interviewed and assisted, and if the matters in which they were interested could not be completely handled by the staff of the Attorney General's Springfield office they were channeled to other agencies of the Commonwealth.

Worcester Area.

During the year the Assistant Attorney General and Legal Assistant assigned to handle Worcester County matters devoted much of their time and efforts to the preparation and disposition of eminent domain cases. Along with these activities the two assistants dealt with motor tort cases, workmen's compensation cases and all other Worcester County matters in which the Attorney General's office became involved. The Assistant Attorney General attended all hearings of the Motor Vehicles Insurance Appeal Board held in Worcester.

Although, as in previous years, no official office was set up in Worcester, the members of the bar, the courts, and the public became increasingly aware that the two assistants assigned to the area were readily available to serve them. Their availability and familiarity with Worcester's problems made more manageable the handling of cases and problems which the members of the bar and public had in their relations with the office of the Attorney General in Boston.

Conclusion.

It has been a privilege and an honor to serve the Commonwealth and its people in the high office of Attorney General, and I wish to express my appreciation to the Governor, the Legislature, and other State officials for their co-operation, and to the Assistant Attorneys General and the other members of the staff for their faithful and efficient services and assistance during the year.

Respectfully submitted,

EDWARD J. McCORMACK, Jr.,
Attorney General.

OPINIONS.

The rules of the Board of Boiler Rules as to boilers in atomic energy installations must, under G. L. c. 6, § 89, be submitted to the Co-ordinator of Atomic Energy, thirty days prior to their effective date.

JULY 1, 1959.

Hon. RAYMOND I. RIGNEY, *Chairman, Commission on Atomic Energy.*

DEAR SIR: — You have requested my opinion concerning the effective date of rules promulgated for the construction, installation and inspection of steam boilers as used in atomic energy installations and authorized under G. L. c. 146, § 2, as amended by St. 1958, c. 525. It is the opinion of this department that the effectiveness of any such rule promulgated under this section must be postponed for the thirty-day period provided in G. L. c. 6, § 89.

The latter statute sets forth the power and duties of the Co-ordinator of the Massachusetts Commission on Atomic Energy and provides that all regulations pertaining specifically to atomic energy matters which are proposed by any department or agency of the Commonwealth must be submitted to the Co-ordinator, and cannot become effective until thirty days after such submission.

There is no patent or latent conflict between the provisions of St. 1958, c. 525, and G. L. c. 6, § 89, because as a matter of practical administration, the terms of each statute can be harmoniously reconciled so as to give effective operation to both. All that is required is that any rule promulgated by the Board of Boiler Rules under St. 1958, c. 525, be submitted first to the Co-ordinator of Atomic Energy for the thirty-day period required by c. 6, § 89, prior to its transmittal to the Commissioner of Public Safety for filing in the office of the State Secretary.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

BY JOSEPH C. DUGGAN,
Assistant Attorney General.

Rights of members of the Board of Registration of Hairdressers to work at hairdressing while serving thereon.

JULY 9, 1959.

Miss GLADYS L. GAROFANO, *Chairman, Board of Registration of Hairdressers.*

DEAR MADAM: — The Board of Registration of Hairdressers has requested an opinion as follows:

"We are herewith requesting your written opinion on the rights of a person working at hairdressing while serving on a statutory appointment as one of the members of the Board under Section 42, Chapter 13, of the General Laws under Section 1 of Chapter 428 of the Acts of 1935."

General Laws c. 13, § 42, authorizes His Excellency the Governor to appoint, with the advice and consent of the Council, a Board of Regis-

tration of Hairdressers consisting of three members, each of whom shall be a practical hairdresser with at least three years' practical experience as such. The General Court goes on to provide in that section that at least two members of the board shall be independent hairdressers operating their own establishments, but *such members* shall not,

"while in office, *actually do the work of hairdressing for compensation.* No *two members* of the board, while in office, shall be in any way interested in any hairdressing establishments in the same town, nor shall any member, while in office, be a teacher at, or have any financial interest in, any school giving courses of instruction in hairdressing or manicuring. . . ." (Emphasis supplied.)

Section 44 of c. 13 provides that the members of the board shall devote their full time to the duties of the offices, and further fixes the salaries of the members.

You will note that the legislative requirements are that two members, at least, of the board shall be independent hairdressers operating their own establishments, and further provides that *such* members shall not, while in office, actually do the work of hairdressing for compensation. It is significant that the General Court has placed no such limitation on the third member of the board, who is not required to be an independent hairdresser operating his own establishment. Since the Legislature in its wisdom has not prohibited a member of the board who is not an independent hairdresser operating his own establishment from actually doing the work of hairdressing for compensation, it is not within the province of this office to insert such a qualification. You do not state in your letter whether the board member in whose status you are interested is one of the independent hairdressers on the board or not. Be that as it may, the legislative intent is clear. The independent hairdressers on the board who operate their own establishments "shall not, while in office, actually do the work of hairdressing for compensation." There is no such limitation as to the third member of the board.

The only qualification upon all of the members is found in § 41, which provides that "the members of the board shall devote their full time to the duties of their offices . . ." "Full time," of course, does not mean twenty-four hours a day. It means, in my opinion, the regular working hours during which the offices of your board are kept open. Nothing more. General Laws c. 30, § 24, describes in some detail the office hours of the various departments of the State Government. General Laws c. 149, § 30A, in much detail, sets forth the ordinary working hours of State employees. I find nothing in § 42 which prohibits a non-operator board member, if he is industrious enough to do so and desirous of earning an honest dollar to support himself and his family, from working at his profession in off hours, provided his work does not interfere with the performance by him of his obligations to the Commonwealth. *Expressio unius est exclusio alterius.*

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A certain letter of a retired veteran was not to be considered an appeal; so considered it was not authorized; the veteran should not be given credit for certain military service.

July 28, 1959.

Hon. Charles Francis Mahoney, *Commissioner of Administration.*

Dear Sir: — You have posed the following questions concerning the retirement of Leo M. Harlow.

1. Does the letter dated May 7, 1957, from Mr. Harlow to the Governor constitute an appeal under the provisions of c. 32 of the General Laws, as amended?

2. If such letter does constitute an appeal, was the appeal reasonable under the statute?

3. Should Mr. Harlow be given credit for seven years of military service?

I observe that your first and second queries relate to the validity of the so-called appeal letter dated May 7, 1957. The papers you have forwarded with your letter reveal a somewhat unusual situation. From them it appears that Mr. Harlow's original application for retirement was for a veteran's allowance under the provisions of G. L. c. 32, § 58, which provide for a retirement allowance after a total period of service of thirty years. However, under date of March 20, 1957, the then Commissioner of Administration forwarded to His Excellency the Governor "application for the retirement of Leo M. Harlow . . . under the provisions of § 57 of c. 32 of the General Laws as amended." In his letter dated May 7, 1957, from Mr. Harlow to His Excellency, he stated that "as of February 28, 1957, I was retired for superannuation with retirement pay for disability in accordance with General Laws, chapter 32, section 57. . . ."

There is no requirement of disability under § 58. Thirty years' service is the principal requirement. There is a requirement of incapacity and only ten years' service for retirement under § 57. In the letter of May 7, Mr. Harlow sets forth the basis for his claim, and requests "that additional retirement credit should be given for military service in excess of seven years in the Army of the United States . . ." with an increase of his retirement allowance accordingly.

Your first two questions relate to the letter of May 7. It does not purport to be a formal appeal from the action of the Acting Governor, to the Governor, but is more in the nature of a request for reconsideration and review. If it was to be considered as an appeal or attempted appeal, I am aware of no provision authorizing or justifying it. If Mr. Harlow was retired under § 57, as appears to be the case, he might have taken an appeal — but not to the Governor.

By the provisions of G. L. c. 32, § 57A, the General Court has expressly provided an appeal from the Governor's decision under the provisions of G. L. c. 32, § 16 (4), within fifteen days to the Contributory Retirement Appeal Board.

The decision in this matter was made over two years ago. In the light of the foregoing, I answer your questions 1 and 2 in the negative. Insofar as it is a question of law, I am also constrained in the light of the foregoing to answer your third question in the negative.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Fred W. Fisher, *Assistant Attorney General.*

The Attorney General does not render opinions on hypothetical questions. Views expressed that a section of the General Appropriation Bill for 1959 (St. 1959, c. 433, § 19) would restrict transfers between subsidiary accounts to those necessary to meet "unforeseen emergencies." "Emergency"; "unforeseen emergency," etc. discussed.

JULY 28, 1959.

MR. KERMIT C. MORRISSEY, *Budget Commissioner.*

DEAR SIR: — You have called my attention to the budget bill (St. 1959, c. 433) which is currently pending before the Massachusetts Senate, and you ask my interpretation of a new proposed § 19 recently adopted by the Senate. Section 19 reads as follows: —

"Notwithstanding the provisions of section twenty-nine of chapter twenty-nine of the General Laws, the budget commissioner is hereby directed to limit the transfer of funds between subsidiary accounts, established as provided in section twenty-seven of said chapter twenty-nine, to those transfers required to meet unforeseen emergencies where funds otherwise are not available to protect the public interest. The budget commissioner shall file forthwith, on the approval of any such transfer, a copy of the authorization with the House and Senate committees on Ways and Means."

You have asked to be advised as to the limits on the power to transfer funds between subsidiary accounts within the meaning of the foregoing language.

I must state to you in the first instance that the proposed § 19 as adopted by the Senate does not as yet have the force of law. Between now and the time that the budget bill is enacted into law the proposed section may be altered in its terms or may be dropped entirely from the budget bill. Under these circumstances, it would appear that your question is based upon the hypothesis that the above-quoted section will be enacted into law.

As you are aware, the office of the Attorney General does not render opinions on hypothetical questions.

In order to be of some assistance to you, however, I may state that the proposed section, if enacted into law, would impose further limitations on the right to transfer funds between subsidiary accounts beyond the restrictions which are currently imposed by G. L. c. 29, § 29.

Under the present law the budget commissioner may approve a transfer of funds from one subsidiary account to another, provided that any proposed expenditure is in accordance with the appropriation made by the General Court, and provided further that the expenditure would not exceed the unencumbered balances which may be available.

The new proposed § 19 would add one additional requirement, *i.e.*, it would require that the transfer be necessary to meet "unforeseen emergencies." Whether this additional limitation would apply to all transfers in subsidiary accounts or whether it would apply only to the amounts which were appropriated by the present budget bill is a matter which cannot be answered until the full budget bill as enacted into law is available for examination.

An "emergency," however, as the word is used in the phrase "unforeseen emergency" in the proposed section is susceptible to legal definition.

Obviously, in the context in which the phrase is used in the proposed legislation, it is contemplated that transfers between subsidiary accounts shall be permissible only upon the occasion of "a sudden unexpected happening; an unforeseen occurrence or condition; specifically, perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity." (Black's Law Dictionary, 4th Ed., p. 615.) On the basis of such definition, it would appear that, negatively, the legislative intent in using the phrase is to prohibit any transfer of funds the need for which can be reasonably anticipated in the budget or within the appropriation limits. In this connotation, the word "unforeseen," as modifying the word "emergency," clearly means an unanticipated set of circumstances. Consequently, if the reason or necessity for a future transfer can be envisaged, or if past or customary practice would dictate the possibility of its future necessity, then it would seem that the legislative intent would be to forbid it.

It further appears that another restriction intended by the proposed section is that one of the criteria justifying a transfer is that it be necessary "to protect the public interest."

The question of whether an "unforeseen emergency" exists or not at a given time is a question of fact to be determined by the officials called upon to make the transfer in question. This office is not in a position to make anticipatory determinations of fact. In making such determination of an emergency it is presumed that the public officials in carrying out their duties will have acted properly. This office ordinarily will accept such determinations of fact as have been made by public officials so acting.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

What is an "unforeseen emergency" justifying a transfer between subsidiary accounts, under St. 1959, c. 433, § 19, is a question of fact for final decision by the Budget Commissioner on the facts reported to him.

AUG. 11, 1959.

Mr. KERMIT C. MORRISSEY, *Budget Commissioner, Administration and Finance.*

DEAR SIR: — You have called to our attention the Appropriation Act for the current year embodied in St. 1959, c. 433, with particular reference to § 19 thereof. Said § 19 limits the transfer of funds between subsidiary accounts to those transfers required to meet unforeseen emergencies. In connection therewith you state that an employee of the Board of Retirement has been temporarily reallocated, requiring that he be paid from the so-called "02" account. There are not sufficient funds in this account at the present time to make the payment required. The Board of Retirement has requested that you approve a transfer of $1,044 from the "01" account to the "02" account in order to make sufficient funds available. You state that the individual in question was employed prior to the adoption of § 19 referred to above, and you ask whether or not this request for transfer constitutes an unforeseen emergency.

In a recent letter to you, dated July 28, 1959, the Attorney General discussed the scope of said § 19 and pointed out to you that the question of whether an unforeseen emergency exists or not is a question of fact to be determined by the officials called upon to make the transfer in question. In the present case it would appear that the Board of Retirement should first determine this question. If the Board finds there is an unforeseen emergency, then the whole matter would be referred to you as Budget Commissioner for such approval as may be required under § 19.

This office is not in possession of facts which will enable us to make the determination for you. We do not know why the employee was reallocated. We do not know what the effect would be if he were transferred back to his regular position. We cannot tell whether the emergency to which you refer is an emergency for the particular employee or whether it is an emergency affecting the public interest. These and many other similar questions are questions of fact to be determined by the proper officials as set forth in the aforementioned letter of July 28. We are attaching herewith a copy of the aforementioned letter of the Attorney General which appears to be self-explanatory.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

By JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

A civil service employee granted a leave of absence subject to his recall who, after having been recalled, does not take up his employment is to be deemed to have resigned and an appointment to the position on a permanent basis may be made.

AUG. 13, 1959.

HON. STEPHEN E. MCCLOSKEY, *Chairman, Labor Relations Commission.*

DEAR SIR: — You have requested an opinion as to the effect of the termination by your commission of a leave of absence granted to an employee of the commission under certain circumstances stated by you.

It appears from the statements made in your letter that a person employed by the commission under a permanent appointment as assistant attorney who was given an extension, until June 9, 1959, of a leave of absence previously granted to him on the condition that he would return to service if recalled by the commission, was so recalled by a letter delivered to him in hand on February 25, 1959, requesting him to return to service with the commission within one week from the date of the letter. The employee in question did not return to service with the commission as requested, and on April 6, 1959, he was notified by letter by the commission that it considered his services to have terminated on the basis of his failure to report for his official duties. The employee never replied to the letter of April 6, 1959. On the same day, April 6, 1959, a copy of the letter to the employee was sent to the Director of Civil Service, and about the same time the commission sought to make a permanent appointment

to the position of assistant attorney, but the requisition therefor was held up as a result of the administration's "no hire, no fire, policy." The Director of Personnel and Standardization did approve a temporary appointment for the purpose of "filling the vacancy" of the employee in question.

Despite the fact that, as stated, the employee did not return to service within one week of the request of the commission by its letter of February 25, 1959, and did not reply to its letter of April 6, 1959, that it considered his services to have terminated, in the latter part of May, 1959, the employee in question sent a letter to the commission requesting a renewal of his leave of absence from June 9, 1959, to June 9, 1960. The commission took no action on the request.

The question raised by the commission is whether a vacancy exists in the position of the employee in question so that it may be filled by permanent appointment, which in turn depends upon the question also raised by the commission as to whether the employee is to be deemed to have resigned from his position.

General Laws c. 31, § 1, defines "resignation" as a permanent voluntary separation from the service. In an opinion of the Attorney General dated August 28, 1951 (Attorney General's Report, 1952, p. 24), it was held that an employee who overstayed a leave of absence had created "a voluntary permanent separation from the service," and had "virtually resigned within the meaning of the statute." In the opinion referred to it was stated, "The resignation does not have to be in writing. A separation from the service may be determined by an oral or written declaration or by no declaration at all. It may be evidenced by a failure to return to work after a leave of absence has expired."

In the case of *Ferrante* v. *Higgiston*, 296 Mass. 208, the respondent was a plumbing inspector who was given a leave of absence for six months, from April 1, 1935, to October 1, 1935. He did not return to service on the latter date, and on October 10, 1935, the petitioner was appointed as his successor. On October 12, 1935, the respondent notified the board of health that he would resume his duties on October 31, 1935. He did not do so. On November 7, 1935, the board of health granted the respondent an indefinite leave of absence not to exceed six months. On January 31, 1936, he notified the board of health he would resume his duties as plumbing inspector on February 1, 1936. After the latter date both parties claimed the office. It was held that if a vacancy existed on October 10, 1935, the petitioner was entitled to the office, and that since the respondent neither resumed work nor obtained a further leave of absence, until October 12, 1935, "considerably more than six months after he ceased to perform his duties on April 1, 1935," he became separated from the service and the petitioner was properly appointed.

The Attorney General's opinion, and the decision of the Supreme Judicial Court referred to, make it clear that a failure to return to work after a leave of absence has expired is, in effect, a resignation within the meaning of the word as used in G. L. c. 31. The leave of absence given to the employee in question was expressly subject to termination by the commission, and the effect of the letter of the commission of February 25, 1959, was to terminate the leave of absence at the expiration of one week after the date of that letter.

In answer to your specific inquiries, I inform you that in my opinion failure of the employee in question to resume the performance of the duties of his position upon the termination of his leave of absence by the letter of the commission of February 25, 1959, created a vacancy in his position, and an appointment, in accordance with the Civil Service Law and other applicable statutes, can be made to fill the vacancy on a permanent basis. The letter of the commission to the Director of Civil Service of April 6, 1959, enclosing a copy of the letter of the commission to the employee of the same date setting forth all the pertinent facts of the situation, constitutes a notice to the director of the termination of the services of the employee involved and the circumstances thereof.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

The Lawrence Airport Commission's authority to make leases would not authorize it to grant a perpetual easement, for a nominal consideration, to Andover of a portion of the airport therein for water wells.

AUG. 13, 1959.

MASSACHUSETTS AERONAUTICS COMMISSION, *Logan Airport.*

GENTLEMEN: — You have requested my opinion relative to the Lawrence Airport Commission – Town of North Andover matter.

In your letter you state that the city of Lawrence through the Lawrence Airport Commission owns property in the town of North Andover which is used for the purpose of a public airport which has been developed with State and Federal financial aid. You state that the town of North Andover desires a perpetual easement in a portion of the airport land for the purpose of installing water wells and related equipment and pipe lines to connect the well field with its present distribution system, and that the commission is willing to grant such right for a nominal consideration. In view of this fact you pose the following question:

"May the Lawrence Airport Commission grant such a perpetual easement, or perhaps a ninety-nine year lease, for the purpose outlined, for a nominal consideration?"

It is the opinion of this office that the present statutory authority granted to the commission does not authorize the granting of the perpetual easement described by you. There is authority under the provisions of G. L. c. 90, § 51F, for the commission to make leases under certain conditions, but the interest which is created by a lease is different than the interest which is created under an easement. For this reason, authority to grant a lease is not authority to grant an easement.

It is noted also that the provisions of § 51H of c. 90 require that the commission shall make reasonable charges for the use of its properties.

Even if it were determined that your commission had a right to grant an easement, the granting of such easement should not be for a nominal consideration but should be based upon a reasonable charge.

In conclusion, your question is answered in the negative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

Application of the section of the General Appropriation Act of 1959 as to approval of rates of compensation for consultant services (St. 1959, c. 433, § 20) discussed generally.

AUG. 19, 1959.

MR. FREDERICK J. SHEEHAN, *State Comptroller.*

DEAR SIR: — You have called to my attention § 20 of the Appropriation Act for the current year, which is embodied in St. 1959, c. 433, and have asked several questions concerning its interpretation. The section in question provides as follows:

"SECTION 20. Except as otherwise provided in section thirteen of chapter seventy-five of the General Laws, no agency of the commonwealth receiving an appropriation under section two of this act shall make any expenditure for consultant services, so called, of services coded in accordance with the expenditure code manual under the subsidiary title '03 Services — Non-employees' unless the rate of compensation for such services shall have been approved by the commission on administration and finance upon the recommendation of the director of the division of personnel and standardization. The said director shall, immediately upon the approval of any such rate or rates, file copies of the schedule or schedules of approved rates with the comptroller and with the House and Senate committees on Ways and Means."

Your questions are general in nature and for this reason any answer that I give to you must also be in general terms. Particular facts relating to any given transaction may affect the generality of the following answers:

Subject to this limitation I advise you as follows:

First, you ask whether the expenditure of funds for consultants or for non-employee services under the "03" account are subject to the limitations set forth in § 20 of said c. 433 under circumstances where the funds involved are not appropriated by said c. 433 but instead have been made available by other specific bond issue statutes.

I answer this question in the negative. It is clear that the provisions of § 20 apply only to agencies receiving funds under the terms of that particular act. The act does not purport to make any permanent change in the method of engaging consultants or in the method of making expenditures under the "03" account. The limitation applies only insofar as

funds are received by an agency under the terms of c. 433. For this reason, § 20 should be interpreted as applying only to funds which are appropriated by c. 433. It would be unreasonable to apply this very limited section to other appropriation acts where the Legislature has not specifically so required.

Second, you ask whether the provisions of § 20 apply to the expenditure of funds for architects or engineers for capital outlay projects authorized by St. 1958, c. 650. To the extent that any such expenditures are made from funds appropriated by c. 433, the limitation does apply — otherwise it does not.

Third, you ask whether the Commissioner of Administration requires the prior recommendation of the Division of Personnel and Standardization before contracting for designer services under the provisions of G. L. c. 7, § 30B. The answer to this question is predicated upon the same principle that governed the answers to questions 1 and 2. If the commission is using funds appropriated by c. 433, the limitation of § 20 thereof applies.

Fourth, you ask whether the Commission on Administration and Finance, acting under the provisions of § 20, may approve consultant rates in amounts larger or smaller than those approved by the Director of the Division of Personnel and Standardization. In those instances where § 20 is applicable, it is my opinion that the Commission on Administration and Finance may not exceed the rate so approved. If the director has approved a specific rate relating to a particular contract, then the contract should be awarded in accordance with approval. If the director has approved a general rate for a type service, then it is possible that such approval may be interpreted as the maximum amount that may be paid for services in that category. The answer to this question, then, depends somewhat upon the nature of the approval given by the director. In general, the Commission on Administration and Finance may not exceed such rate, but under some circumstances it may be able to award contracts at a lower rate.

Fifth, you ask whether the limitation of § 20 applies to already written contracts for consultant services where such services are not to be completed prior to June 30, 1960. It is assumed that moneys were available for the purposes of these contracts at the time they were entered into, as required by the provisions of G. L. c. 29, § 26. It would appear, therefore, that funds other than those appropriated by the 1959 Appropriation Act would be used to pay for these services. For this reason the limitation of § 20 would not be applicable as previously stated.

Sixth, you ask whether particular vouchers already presented to you are subject to the limitations. I answer again that if vouchers are to be satisfied under moneys appropriated under the provisions of St. 1959, c. 433, the limitation is applicable — otherwise it is not.

Seventh, you ask whether the limitation is applicable to the Legislative and Judicial departments. In general, the limitation of § 20 is applicable to all agencies of the Commonwealth. Many of the limitations on engaging personnel which may be imposed upon the Executive branch of the government are not necessarily applicable to the Legislative. Likewise, there are certain differences in the right to hire personnel that may exist between the Executive and the Judicial branches. For this reason, it is not desirable to make a general statement as to whether the limitation of

§ 20 is in all circumstances applicable to hiring by the Legislature and the Judiciary. If a particular question arises concerning the engaging of a particular individual by either the Legislature or the Judiciary, then I will attempt to answer your questions predicated upon the particular facts presented.

Eighth, you have asked whether the limitations of § 20 apply to Federal grants and to trust funds. For the reasons previously stated, the limitation is not applicable to these moneys but is applicable only to funds received under the provisions of St. 1959, c. 433.

I must caution you again that your questions are general in scope and do not apply to any particular factual situation.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

G. L. c. 94, § 14, requiring a license from the Department of Public Works for work done in tidewaters is recognized by the Massachusetts Port Authority Act, but that act excepts the Authority from the requirement of a license as to work within the "port of Boston" but not for work outside said port.

AUG. 20, 1959.

MR. RODOLPHE G. BESSETTE, *Director, Division of Waterways, Department of Public Works.*

DEAR SIR: — You have recently requested an opinion relative to the powers of the Massachusetts Port Authority in connection with tidewaters of the Commonwealth, and the necessity of the Authority to obtain licenses for work to be done in tidewaters from the Division of Waterways of the Department of Public Works.

General Laws c. 91, § 14, provides:

"The department of public works may license and prescribe the terms for the construction or extension of a wharf, pier, dam, sea wall, road, bridge or other structure, or for the filling of lands or flats, or the driving of piles in or over tide water below high water mark, but not, except as to a structure authorized by law, beyond any established harbor line, nor, unless with the approval of the governor and council, beyond the line of riparian ownership. . . ."

This section of the law clearly establishes a broad power in the Department of Public Works to license and control structures and other work in tidal flats, and is exclusive to the Department of Public Works unless other statutory provisions are enacted by the Legislature.

Section 6, paragraph 6, of the Massachusetts Port Authority enabling act, St. 1956, c. 465, as amended by St. 1958, c. 599, recognizes the authority of the Department of Public Works, acting through the Division of Waterways

". . . to excavate and dredge mooring basins for yachts and small craft, dredge channels, construct shore protection, remove hulks and wrecks,

issue licenses and permits for filling, dredging, building of structures or excavating within the port of Boston as defined in section one (of the act) *providing no such license or permits shall be required to be obtained by the Authority.*" (Emphasis supplied.)

Section 1, subsection (*i*), of the Massachusetts Port Authority enabling act defines the terms "port properties" and "port of Boston."

It is clear that the enabling act establishing the Port Authority provided a limitation of the authority of the Department of Public Works with respect to the tidelands within the area given to the control of the Port Authority, at least to the extent that the Authority was not required to obtain licenses to work in tidewaters.

Therefore, the answer to your first question is in the negative and the Port Authority is not required to secure a license from the Division of Waterways for work in tidewaters *within* the port of Boston, as defined in section 1 of the enabling act.

In answer to your second question as to whether or not the Massachusetts Port Authority is required to secure a license or permit from the Division of Waterways for work in tidewaters outside the limits of the port of Boston, as defined in section 1 of the enabling act, the answer is in the affirmative. The broad power of the Department of Public Works acting through the Division of Waterways is limited only by the express language of the enabling act and is strictly confined to the port of Boston as defined by § 1, subsection (*i*), of the act.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By CHARLES E. FRAZIER, JR.,
Assistant Attorney General.

A corporation is eligible as a bidder, or sub-bidder, for plumbing work on State building construction projects, but the plumbing work involved must be done by licensed plumbers.

AUG. 27, 1959.

MR. HALL NICHOLS, *Director, Division of Building Construction.*

DEAR SIR: — You have requested my opinion in connection with the award of a contract for the construction of a building at the University of Massachusetts. You state that a sub-bid for plumbing work has been filed by the Mutual Plumbing and Heating Company of Amherst, and that said company is a corporation. A protest against this sub-bidder has been filed by another sub-bidder, alleging that work of a master plumber cannot be performed by a corporation. In view of this protest, you ask whether or not a corporation may be an eligible bidder or sub-bidder on State building construction projects for plumbing work.

I answer your question in the affirmative. It is correct that the work of a master plumber may not be performed by a corporation (*Attorney General* v. *Union Plumbing Co., Inc.*, 301 Mass. 86, [1938]). The aforementioned case, at page 89, recognizes, however, that a corporation may enter into a

contract for the performance of such plumbing work, provided, that the corporation contracts with a registered or licensed plumber to perform the work and does not itself enter into the business of a master plumber.

Subject to the limitations that the work must actually be done by a master plumber, there is no prohibition against a corporation entering into a contract for such work.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

Notes given by the State Treasurer under G. L. c. 29, § 47, for borrowings in anticipation of receipts must, under G. L. c. 29, § 48, be approved by the Governor and countersigned by the Comptroller.

AUG. 31, 1959.

HON. JOHN F. KENNEDY, *Treasurer and Receiver General.*

DEAR SIR: — You state that as Treasurer, you contemplate borrowing the sum of $20,000,000 on behalf of the Commonwealth in anticipation of receipts, as provided by G. L. c. 29, § 47. You also state that notes are to be issued for this sum, and you ask whether it is mandatory for the Governor to sign said notes and for the Comptroller to countersign the same.

Your attention is called to G. L. c. 29, § 48, which provides as follows:

"Notes for money borrowed in anticipation of the receipts shall be signed by the state treasurer, approved by the governor, and countersigned by the comptroller."

From the foregoing statute it is clear that a note issued under § 47 and signed by the Treasurer alone would not be validly issued. Section 48 makes it mandatory that the approval of the Governor also be obtained and that the Comptroller countersign the note.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

A person retired from the service of a city may not, under G. L. c. 32, § 91, be employed by the Commonwealth, and the waiver by him of his city pension, under G. L. c. 32, § 90B, does not operate to make the prohibition of § 91 inapplicable.

SEPT. 8, 1959.

MR. FREDERICK J. SHEEHAN, *State Comptroller.*

DEAR SIR: — You have requested an opinion whether payment can be made for services rendered, as an employee of the State Department of Public Works, by a person who, prior to his employment, had been retired from the service of the city of Boston.

You state that the person referred to has been employed by the State

since May 16, 1951, and that you have been informed by the Retirement Board of the city of Boston that he "Waived Pension of $1400.00 per annum, in accordance with section 90B of chapter 32, G. L." You also state that you have received from the State Retirement Board, a copy of a letter dated April 17, 1959, which the board sent to the employee in question informing him that it had ruled that he was not eligible for membership in the retirement system for State employees, and had ordered that any and all contributions made by him during his employment with the State be refunded to him.

Apparently, the person you refer to retired from the service of the city of Boston some time prior to May 16, 1951, the date upon which he began service with the Department of Public Works of the Commonwealth.

You refer to G. L. c. 32, § 91, which provides, so far as material here, that no person while receiving a pension or retirement allowance from a city shall, after the date of his retirement, be paid for any service rendered to the Commonwealth, except upon his return and restoration to active service as ordered by the appropriate retirement board after re-examination in case of retirement for disability, and except in certain other situations not applicable here.

The provisions of G. L. c. 32, § 91, referred to, were in effect in the same form in 1951.

The express prohibition of G. L. c. 32, § 91, against the payment of a person receiving a retirement allowance from a city for services rendered to the Commonwealth, after the date of his retirement, prevents the payment of compensation to the employee you refer to, unless the fact that he has waived his city of Boston pension under G. L. c. 32, § 90B, operates to make the prohibition contained in said G. L. c. 32, § 91, inapplicable.

Said section 90B provides that any person retired from the service of the Commonwealth, or any of its political subdivisions, may waive and renounce for himself, his heirs and legal representatives "any portion" of the pension or retirement allowance payable to him from the Commonwealth, or any of its political subdivisions, for such period as he may specify, or until further notice.

If the provisions permitting a waiver or renunciation of "any portion" of a pension or retirement allowance, properly construed, permit a waiver or renunciation of only a "portion" of the amount due to a former employee, and not of the entire amount due, no action taken by a retired employee under G. L. c. 32, § 90B, could possibly operate to relieve the employee from the prohibition in G. L. c. 32, § 91, against re-employment in the public services mentioned in said section of retired public employees referred to therein.

There are strong reasons for the conclusion that G. L. c. 32, § 90B, does not permit a total waiver or renunciation of a pension or retirement allowance by a retired public employee. General Laws c. 4, § 6, cl. 3rd, provides that in the interpretation of statutes the words used are to be construed according to their "common and approved usage." Construed according to that standard, the word "portion" means a part which is less than the whole. Furthermore, the history of the provisions of G. L. c. 32, § 90B, demonstrates that the purpose sought to be effected by the enactment of G. L. c. 32, § 90B, was not to effect any change in the provisions of G. L. c. 32, § 91, but was to permit veterans retired from the service of the Commonwealth, or its political subdivisions, whose pensions or retire-

ment allowances exceeded $1,400 in the case of unmarried veterans, or $2,700, in the case of married veterans, to reduce the amount of their retirement allowances below said amounts of $1,400 and $2,700, so as to take the veteran out of the operation of provisions of Federal statutes such as those contained in 38 U.S.C. § 2422, providing that no pension under 38 U.S.C. §§ 2421 to 2423, should be paid to an unmarried veteran whose annual income exceeded $1,400, or to a married veteran, or any veteran with children, whose annual income exceeded $2,700. (See now 38 U.S.C. § 522.)

It is not necessary, however, to decide whether G. L. c. 32, § 90B, permits the waiver or renunciation of an entire pension or retirement allowance, for if it did, such a waiver or renunciation would not have the effect of permitting payment to a person who, like the person referred to by you, was retired from the service of the city of Boston, for services rendered to the Commonwealth after the date of such waiver or renunciation despite the provisions of G. L. c. 32, § 91.

The provisions of G. L. c. 32, § 90B, cannot reasonably be construed to have been intended to so affect the provisions of G. L. c. 32, § 91, as to permit persons retired from one of the governmental units referred to in said § 91 to drop their pensions and retirement allowances and be employed in the same or one of the other governmental units referred to. The purpose of § 91, which has been on our statute books in some form for over fifty years, is to prevent a retired employee of one of the governmental units referred to in the section from being re-employed in one of the other governmental units referred to therein. The strictness of the general prohibition is moderated, to a limited extent, by permitting a retired person, under specified conditions, to accept one of certain other appointive public positions if he "waives and renounces" his pension or retirement allowance. If a total waiver of a pension or retirement allowance under G. L. c. 32, § 90B, were to have the effect of removing the bar against re-employment contained in G. L. c. 32, § 91, the limited right to waive or renounce a pension or a retirement allowance contained in § 91, as a condition to service in the appointive positions in the public service specified therein, would be entirely unnecessary.

Construing G. L. c. 32, § 91, according to the established rules of statutory construction, that a statute must be construed as a whole, giving effect to all its provisions so far as possible, and that every word of a legislative enactment must be given force and effect so far as reasonably practicable, and no part is to be treated as superfluous unless no other rational course is open (*Hinckley* v. *Retirement Board of Gloucester*, 316 Mass. 496), and that the various provisions of a statute, if reasonably possible, should be read together so as to make the statute a consistent and harmonious whole (*Real Properties, Inc.* v. *Board of Appeal of Boston*, 311 Mass. 430), the provision of § 91, that despite the prohibition against re-employment of retired persons such a person can be re-employed in certain positions if he "waives or renounces" his pension or retirement allowance, must be considered as stating the only conditions under which a waiver or renunciation of a pension or retirement allowance can operate to permit a retired person to be re-employed. The fact that there are no provisions in c. 32 fixing a method for the re-establishment of membership in a retirement system, and for obtaining credit for subsequent service, by a retired person returning to the public employ, is a strong indication that the Legislature

felt that no such provisions were necessary because G. L. c. 32, § 91, prevented the re-employment of retired persons, and made retirement a final termination of public employment, with the few exceptions stated in the section.

I advise you, therefore, that the provisions of G. L. c. 32, § 91, forbid payment to the retired city of Boston employee referred to in your letter for services rendered to the State Department of Public Works, despite the fact that he waived payment to him by the city of the entire amount of the pension or retirement allowance which he was granted by the city of Boston, either for a definite or indefinite period.

The opinion expressed herein is not in conflict with the opinion of the Attorney General to the Comptroller, dated April 27, 1943 (see Attorney General's Report, 1944, p. 45), nor with the opinion to the Governor, dated July 8, 1953 (see Attorney General's Report, 1954, p. 21). The conclusions reached in the opinions referred to were predicated on the fact that the employee there involved was re-employed prior to receiving any payment under his pension, and, at the time, G. L. c. 32, § 91, prohibited payment for services rendered by a retired employee "after the date of the first payment of such pension." The section now prevents payment for services rendered by a retired employee "after the date of his retirement." The opinion of the Attorney General to the State Board of Retirement dated August 17, 1949 (see Attorney General's Report, 1950, p. 17), does not refer to G. L. c. 32, § 91, the provisions of which, as hereinbefore stated, forbid the re-employment of retired persons in the public service under the circumstances stated in the section, except as otherwise expressly provided therein.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

It is the duty of the superintendent of a State hospital to cause applications for the commitment of persons temporarily held who are determined to be in need of further treatment to be made.

SEPT. 11, 1959.

JAMES W. DYKENS, M.D., *Assistant Commissioner, Department of Mental Health.*

DEAR SIR: — You have requested an opinion on the following question:

"We would like very much to have an opinion as to the definition of the word 'cause' as used in sections 79, 77 and 86 of chapter 123 of the General Laws, as the word 'cause' is used in the sentence, 'cause application to be made.'

"Does that word mean that the Superintendent has the right or obligation to make application or does it mean that he is only the agent in getting some interested relative to make the application?"

General Laws c. 123, § 77, provides, in part, ". . . If, however, the superintendent or manager determines within said forty-day period that

the person is in need of further treatment, he may forthwith cause application to be made for prolonged judicial commitment under section fifty-one . . ."

General Laws c. 123, § 79, provides, in part, ". . . The superintendent or manager shall either cause every such patient to be examined by two physicians, qualified as provided in section fifty-three, and cause application to be made for his admission or commitment to such institution, or cause him to be removed therefrom before the expiration of said period of ten days . . ."

Section 77 provides for the commitment of individuals for observation purposes for a temporary period not to exceed forty days, while § 79 provides for temporary care of mentally ill persons who are in need of immediate confinement for a period not to exceed ten days. Both these sections anticipate further proceedings during the confinement of these individuals.

It would appear that the legislative purpose, as expressed in the aforementioned sections, was to outline the functions and duties of the managers and superintendents of these institutions once a mentally ill person was admitted thereto. This being the case, it would follow that the legislative intent was to place the responsibility upon the superintendent or manager to see that certain steps were taken.

The use of the word "cause" by the Legislature in these sections was for the purpose of authorizing a manager or superintendent to perform those duties personally, or to delegate them to a subordinate.

In conclusion, it would appear that the Legislature in the above-mentioned statutes place these duties squarely on the shoulders of the superintendent or manager of these mental institutions, but at the same time authorize them to delegate their actual performance to someone else.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH C. DUGGAN,
Assistant Attorney General.

A licensed dealer in firearms is subject to the conditions of his Massachusetts license in making sales to out-of-state buyers.

SEPT. 11, 1959.

Hon. J. HENRY GOGUEN, *Commissioner of Public Safety.*

DEAR SIR: — You have requested my opinion as follows:

"An opinion is respectfully requested as to the right of a licensed dealer to sell firearms under the following conditions:

"The dealer, properly licensed under the provisions of G. L. c. 140, § 122, receives a mail or telephone order from a person residing in another State, in which the prospective buyer requests that a weapon be shipped to his home or place of business.

"If the interstate shipment is completed with the dealer complying with any existing Federal Regulations, would he still be subject to the conditions of his Massachusetts license, and in particular, to the second, fourth,

sixth, seventh, eighth or ninth conditions, as set forth in G. L. c. 140, § 123?"

The presumption of compliance with the existing Federal regulations would preclude any answer as to the compliance with the State license. Title 15, § 902, subdivision (c) of the U. S. Code states:

"It shall be unlawful for any licensed manufacturer or dealer to transport or ship any firearm in interstate or foreign commerce to any person other than a licensed manufacturer or dealer in any State the laws of which require that a license be obtained for the purchase of such firearm, unless such license is exhibited to such manufacturer or dealer by the prospective purchaser."

The effect of this section is to incorporate in interstate commerce the same license restrictions as to the sale of firearms which apply in the selling State. Therefore, it would be a *non-sequitur* to presume compliance with the Federal regulations without first considering the Massachusetts licensing requirements.

In view of the aforementioned statute, the dealer would be subject to the conditions of his Massachusetts license and in particular to the second, fourth, sixth, seventh, eighth and ninth conditions as set forth in G. L. c. 140, § 123.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH C. DUGGAN,
Assistant Attorney General.

The State Finance Advisory Board is subject to the "Open Meeting Law" (G. L. c. 30A, § 11A), but said law contains provisions for executive sessions and secret records in certain circumstances.

SEPT. 28, 1959.

MR. SHERWIN C. BADGER, *Chairman, Finance Advisory Board.*

DEAR SIR: — You have requested my opinion relative to the application of St. 1958, c. 626, to your board.

In this letter you state:

"Except by special invitation our meetings have always been in executive session for the very obvious reason that the matters we are dealing with have principally to do with anticipated State financing through the issuance of bonds, etc. Very obviously, such matters must be kept confidential until the Treasurer has made his final decision as to the terms which competitive bidding of proposed issues will follow. Also, our board has no authority whatsoever but acts merely in an advisory capacity."

However, this board, by virtue of the provisions of G. L. c. 6, § 98, is vested with serious responsibilities to the State government relative to investigating and reporting to the Governor and Council, the State Treas-

urer and the General Court its recommendations as to extremely important phases of State financing, and furnishing the State Treasurer with advice and recommendations as to the investment of funds of the Commonwealth.

In my opinion your board is a "state board" within the provisions of G. L. c. 30A, § 11A, as inserted by St. 1958, c. 626, § 2. However, under the provisions of § 11A, your board may "vote to go into executive session." The phrase "executive session" is defined in § 11A as being a meeting "held only for the purpose of discussing, deliberating or voting on those matters which by general or special statute, or federal grant-in-aid requirements, cannot be made public, and those matters which if made public might adversely affect the public security, *the financial interests of the commonwealth or its political subdivisions, or the reputation of any person.*" Section 11A goes on to provide that the board shall maintain accurate records of its meetings, setting forth the action taken at each meeting, including executive sessions, with a proviso that votes taken in executive session may remain secret so long as their publication would defeat the lawful purposes of the executive session, but no longer, and a further proviso that "the records of any executive session may remain secret so long as their publication would defeat the lawful purposes of the executive session, but no longer." The concluding paragraph of § 11A as inserted by § 2 of c. 626 contains a number of exemptions from the operation of c. 626. Your board is not among the exemptions.

In conclusion, as before stated, it is my opinion that c. 626 applies to your board. Of course, the provisions relating to executive sessions, after your board votes to go into executive session, become and are applicable.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

County Commissioners may not under G. L. c. 35, § 19A, applicable to classified county employees, make payments for the earned but unused vacation allowances due deceased probation officers, who are not classified.

NOV. 3, 1959.

MR. ALBERT B. CARTER, *Commissioner of Probation.*

DEAR SIR: — You have requested my opinion upon the question whether county commissioners have the authority under the provisions of G. L. c. 34, § 14, to pay the beneficiaries of a deceased district court probation officer for vacation allowances earned but not used by the deceased.

General Laws c. 35, § 19A, as amended by St. 1958, c. 293, provides that "upon the death of a county employee who is eligible for vacation *under the rules of the county personnel board . . .*" (emphasis supplied), payment may be made for the earned, but unused, vacation allowances of the deceased employee either to the retirement system beneficiary designated by the employee, if any and if surviving, or to the estate of the deceased.

General Laws c. 35, § 51, authorizes the County Personnel Board to establish uniform rules governing leaves of absence "*. . . for officers and*

employees subject to sections forty-eight to fifty-six, inclusive . . ." (emphasis supplied) of the chapter.

General Laws c. 35, § 48, in providing that offices and positions the salary whereof is wholly payable from the treasury of one or more counties should be classified in the manner provided by §§ 48 to 56, inclusive, expressly excludes "probation officers."

In view of the specific provision of G. L. c. 35, § 19A, referred to above, that the payments therein provided for can be made only to employees who are eligible for vacation under the rules of the County Personnel Board, which board is authorized to establish rules as to vacation only for officers and employees subject to G. L. c. 35, §§ 48 to 56, inclusive, and the fact that probation officers are expressly excluded from the operation of said §§ 48 to 56, inclusive, G. L. c. 35, § 19A, would not authorize payment for accumulated vacation allowances of deceased probation officers.

While the provisions of G. L. c. 276, § 89, that the compensation paid to a temporary probation officer for any excess of thirty days' service in any year shall be deducted from the compensation of the probation officer in whose place such service is rendered, except that no such deduction shall be made for any additional period of not exceeding thirty days in any year during which a probation officer is absent because of illness, do not specifically designate the first-mentioned period of thirty days as a vacation period, it is apparent that such a period would be covered by the provisions.

However, while the provisions referred to would prevent deduction from the compensation of a probation officer of amounts paid to a temporary probation officer appointed to substitute during any period of absence for vacation, not in excess of thirty days, of a probation officer, they would not authorize payment of any amount which would not have been deducted from the compensation of a deceased probation officer if he had survived and had been absent on vacation for the whole or any remaining portion of such thirty-day period either to the estate of the deceased or any survivor of the deceased.

The provision of G. L. c. 34, § 14, that county commissioners shall have the management of their county's business and affairs in cases where not otherwise expressly provided, could not, in my opinion, be construed to authorize county commissioners to make payments to the surviving beneficiaries of a deceased probation officer for any period for which, if the deceased had survived and had devoted it to vacation, no deduction would have been made from the compensation of the probation officer because of compensation paid to a temporary probation officer appointed to serve in his place.

It is unfortunate that the provision added by the 1958 amendment to G. L. c. 35, § 19A, was phrased in the way it was. Had it provided that payment could be made to any county officer or employee who is eligible for vacation, payment for the accumulated vacation allowance of the probation officer in question would be authorized. The effect of the wording used in the 1958 amendment, to restrict payment for accumulated vacation allowances to persons whose vacation rights are fixed by the rules of the County Personnel Board undoubtedly was not intended. It would appear that the draftsman of the amendment followed the wording of G. L. c. 29, § 31A, which is applicable to State employees, and overlooked the narrowing effect of the reference to the rules of the County Personnel Board.

The Commission on Probation could recommend that the provision added to G. L. c. 35, § 19A, by St. 1958, c. 293, be amended to give the survivors of deceased probation officers, and other county officers and employees whose vacation rights are provided for under other provisions than the rules of the County Personnel Board, the same rights as to payment for earned but unused vacation credits that are given to other county employees. Any such recommendation could reasonably be drawn so as to provide that it should be retroactive, and take effect from the effective date of the 1958 amendment to G. L. c. 35, § 19A, and so permit payment for the earned but unused vacation credits of probation officers, or other county officers and employees not included within the present provisions of said § 19A, who died on or after the effective date of the 1958 amendment and prior to the enactment of any extension of the provisions of § 19A, to probation officers, and such other county officers and employees.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

Under St. 1958, c. 566, the Metropolitan District Commission is required to take, fill and use the entire Patten's Cove area for recreational purposes and not merely a part thereof.

NOV. 10, 1959.

Hon. JOHN E. MALONEY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have requested an opinion relative to St. 1958, c. 566, and the Patten's Cove project.

After setting forth in brief the terms of c. 566, you pose the following question:

". . . whether the commission is bound by said act to take, fill and use the entire area for recreational purposes or can it take, fill and use part thereof."

Chapter 566 provides that the Metropolitan District Commission is hereby authorized and *directed* to cause the *area known as Patten's Cove* adjacent to and westerly of the William T. Morrissey Boulevard in the Dorchester district of Boston to be filled and graded and to construct thereon and in the immediate vicinity thereof such facilities for recreation as may be necessary for the establishment of a suitable recreational area *at that location;* provided, that the *recreational area as herein authorized* shall not include any part of the land described in Certificate of Title #62994 issued by the Land Court.

The language of the act requires that the entire cove be filled and graded with the exception of that land included in Certificate of Title #62994. If the land on which such fill would be placed is not now owned by the Commonwealth, then, of course, it could be acquired for the Commonwealth by the commission.

It is true, as you say, that this act does not set forth that a taking is authorized. However, by virtue of the provisions of c. 92, § 33, the

commission may acquire, maintain and make available to the inhabitants of Boston, and the other municipalities constituting the metropolitan parks district, open spaces for exercise and recreation, in this chapter called reservations. Moreover, by virtue of the provisions of G. L. c. 92, § 79, the commission for the purposes set forth in § 33 may in consultation with the proper local boards, in behalf of the Commonwealth, take in fee or otherwise, by purchase, gift, devise or eminent domain under c. 79, lands and rights in land for reservations within the metropolitan parks district.

While it would have been a little safer for the General Court to have given to the commission specific power to take under c. 566, I have no doubt that it believed, and, in my opinion properly so, that the provisions of § 79 conferred sufficient power in the commission to accomplish the purposes set forth in c. 566.

It is my opinion that the commission is in duty bound to obey the mandate of the General Court. Chapter 566 not only authorizes the commission but directs it to fill and grade as stated therein.

Answering your question you will note that c. 566 directs the commission to cause

". . . the area known as Patten's Cove adjacent to and westerly of the William T. Morrissey Boulevard in the Dorchester district of Boston to be filled and graded and to construct *thereon* and in the immediate vicinity thereof such facilities for recreation as may be necessary for the establishment of a *suitable recreational area at that location;* . . ." (Emphasis supplied.)

The General Court seems to have treated the project as an undivided unit. Although you have not so stated, I assume that adequate funds are available to accomplish the result envisioned by the General Court in this legislation.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

BY FRED W. FISHER,
Assistant Attorney General.

There is no limitation as to the number of children necessary to constitute a "special class" for the instruction of mentally retarded children.

NOV. 20, 1959.

MR. JOSEPH FREEDMAN, *Secretary, Massachusetts Special Commission on Retarded Children.*

DEAR SIR: — You have requested my opinion relative to classes for retarded children.

It appears from the provisions of G. L. c. 71, § 46, that at the beginning of each school year the school committee of every town where there are five or more children of school age and resident therein retarded in mental development *shall,* and in every town where there are less than five such children *may,* establish special classes for the instruction of the educable

and trainable mentally retarded children, under regulations prescribed by the Department of Education. It appears moreover from the provisions of G. L. c. 71, § 46C, that any town having fewer than ten mentally retarded children may, with the approval of the Department of Education, join with another city or town to provide the necessary special classes provided for in § 46.

You now pose the following question:

"What constitutes a class as related to the education of physically and mentally handicapped children?"

Section 46 clearly authorizes a town school committee to establish a special class for the instruction of the mentally retarded children referred to therein, under regulations prescribed by the department. This, of course, would include any number less than five. Section 46C authorizes a town having fewer than ten mentally retarded children, with the approval of the department, to join with another city or town to provide the necessary special classes provided for in § 46.

The General Court, therefore, has made it clear that the children referred to in the legislation before mentioned may be taken care of in two different ways. First, by special class as provided in § 46 if the number is small, and second, by a joint undertaking between another or other municipalities. General Laws c. 69, § 29B, authorizes reimbursement in the above cases "upon approval of the department and certification by it that such classes meet the standards and requirements prescribed by it."

The General Court has placed no limitation on the size of the class where there are less than five such children therein referred to. The subject of reimbursement is dealt with in § 29B and the approval by the department and certification by it as therein provided for is, of course, necessary.

A broad and understanding interpretation of the above legislation is to be applied in these matters, since wisdom and knowledge as well as virtue diffused generally among the body of our people through education was one of the primary concerns of the founding fathers. Mass. Const., pt. 2d, c. V, § II.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Trustees of the Lowell Technological Institute may not exempt employees' children from tuition charges.

Nov. 20, 1959.

Mr. Martin J. Lydon, *President, Lowell Technological Institute.*

Dear Sir: — You have requested an opinion relative to the power of the board of trustees of your institute and you pose the following question:

"The board of trustees has been requested by the faculty to establish a policy which would forgive tuition and charges to sons and daughters of employees of the Institute.

Is it your opinion that such an action, if taken, would be consistent with the provisions of G. L. c. 75A, § 14, and would the action be one within the scope of the authority of the board?"

The authority of your trustees to deal with the matter you refer to is set forth in G. L. c. 75A, § 14. In § 14 it is provided that

"The trustees may *fix* the *rates* of tuition to be charged by the institute, but the yearly tuition for day-school students who are non-residents of the commonwealth shall not be less than one hundred and fifty dollars."

This subject matter has been of concern to the General Court for over a half century beginning with Acts of 1899, Resolve 55. You will notice that this section, in the first place, presupposes that students at the institute will pay tuition. A "rate" has been defined as a charge set according to a fixed scale. The word "fix" has been defined as — to make firm or fast; to set definitely.

Since the authority resting in the trustees under § 14 relative to this subject matter is to "fix rates," it is clear to me that no power rests in the board to exempt or "forgive" tuition and charges to sons and daughters of employees of the institute.

I therefore answer your question in the negative.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

A new temporary position in the State service may be temporarily classified and allocated under G. L. c. 30, § 45, when the Legislature is not in session although the position has not been included in a schedule of permanent positions as provided in said section.

Nov. 20, 1959.

Hon. William D. Fleming, *Chairman, Joint Committee on Ways and Means.*

Dear Sir: — You have requested my opinion on the following question:

"May a new temporary office or position subject to the classification and pay plan provided by G. L. c. 30, § 45, and essential for the operation of the services of the Commonwealth, be temporarily classified and allocated when the Legislature is not in session unless such office or position shall have been included in a schedule of permanent offices and positions approved by the

Joint Committee on Ways and Means, a copy of which is on file with the Director of Personnel and Standardization?"

General Laws c. 30, § 45, providing for the classification of positions in the service of the Commonwealth, provides in clause (5) as appearing in St. 1956, c. 729, § 3, that,

"No permanent allocation or reallocation, in accordance with this section, of any office or position subject to the classification and pay plans provided by this section, shall be effected, unless and until

"(*a*) a request for such allocation or reallocation shall have been made in writing to or by the director of personnel and standardization;

"(*b*) the written recommendation, if any, upon such request shall have been prepared by said director, which shall include the request, the comment and recommendation of the appointing authority concerned which he is hereby required to make to said director;

"(*c*) the written recommendation complying with clauses (*a*) and (*b*) shall have been filed on or before November fifteenth, and from time to time thereafter, by the director of personnel and standardization with the budget commissioner and the house and senate committees on ways and means, and shall be considered as a part of the budget preparation as provided in section six of chapter twenty-nine;

"(*d*) it shall have been included in a schedule of permanent offices and positions approved by the joint committee on ways and means, a copy of which is on file with the director of personnel and standardization; provided, however, that during the period when the legislature is not in session, any new temporary office or position subject to the classification and pay plans provided by this section and essential for the operation of the service of the commonwealth may be temporarily classified and allocated, but shall not be effected unless and until clauses (*a*) and (*b*) shall have been complied with."

The provisions of G. L. c. 30, § 45 (5), quoted, cannot be fully understood without reference to certain provisions included in the annual general and other appropriation bills in the current, and recent prior years, and to the principle that, under our Constitution, the Legislature is prohibited from exercising executive power.

The provision of the general appropriation acts referred to is the so-called "salary freeze" provision, which has been included in one form or another in each general appropriation act since that of 1943. In the general appropriation act for the current year, St. 1959, c. 433, the provision referred to is part of § 6 and, so far as here material, reads as follows:

"SECTION 6. Amounts included for permanent positions in sums appropriated in section two for personal services are based upon schedules of permanent positions and salary rates as approved by the joint committee on ways and means, and, except as otherwise shown by the files of said committee, a copy of which shall be deposited with the division of personnel and standardization, no part of sums so appropriated in section two shall be available for payment of salaries of any additional permanent position, or for payments on account of reallocations of permanent positions, or for payments on account of any change of salary range or compensation of any permanent position, notwithstanding any special or general act to the contrary; . . ."

The reference to the schedules of permanent positions described in the provision quoted, incorporates those schedules in the act and, in effect, makes them a part of the act. In order to have the effect stated, the schedules to be incorporated by reference would not only have to be identified but would have to be in existence at the time the act incorporating them by reference was acted upon in the General Court. The provision quoted adequately identifies the schedules referred to, and it is to be assumed that the schedules were in existence at the time the act containing them was before the General Court.

It is to be noted that G. L. c. 30, § 45 (5), requires only that "permanent" allocations and reallocations be included in a schedule of "permanent" offices and positions, approved and filed as stated, and that the quoted provisions of St. 1959, c. 433, also apply only to "permanent" positions.

In *Opinion of the Justices to the Senate*, 302 Mass. 605, it is stated at pages 615 and 616:

". . . the General Court in the exercise of its legislative power of appropriation has a broad scope for determining whether it will prescribe in detail the particular purposes for which money appropriated shall be expended or, on the other hand, will permit executive or administrative officers or boards to exercise judgment and discretion within a wide field in the expenditure of money appropriated for a given object to accomplish the general purposes of the appropriation. The choice of the latter alternative has been made frequently . . ."

And, at page 619, referring to the question of whether the transfer of funds from an appropriation to meet "unforeseen conditions" could be made subject to the approval of a recess body composed of members of the General Court, the Justices stated:

"If the power conferred by the bill on this recess body were to be regarded as legislative in nature, it would be a legislative power of appropriation which cannot be delegated."

Earlier in the opinion, the Justices stated, at pages 614 and 615, that the power of transfer provided for in the bill would not be the legislative power of appropriation but rather would be an executive or administrative power of expenditure.

The Justices finally ruled in the opinion cited that the recess body contemplated by the bill could not be composed of members of the Legislature then in session, nor, since the power of appointment is an executive power, could the bill provide that the members of the recess body be appointed by the President of the Senate and the Speaker of the House of Representatives.

Reading G. L. c. 30, § 45 (5), with the provisions of St. 1959, c. 433, § 6, quoted above, in the light of the method of statutory enactment pursued and the observations of the Justices referred to contained in the opinion in 302 Mass. 605, it would appear that, while the Legislature has elected to restrict the executive and administrative officers and boards of the Commonwealth in expending appropriations so far as regards the creation of new permanent positions, or permanent reallocations of permanent positions, or changes of salary ranges of permanent positions, it has elected to permit the executive and administrative officers and boards of the Commonwealth to exercise judgment and discretion as to whether a new

temporary office or position should be created during the period when the Legislature is not in session.

Undoubtedly, the Legislature could have prohibited the creation of new temporary positions as well as of new permanent positions. Whether it could have provided that the creation of new temporary positions during the period when the Legislature is not in session should require the approval of the Joint Committee on Ways and Means, would be questionable in view of the position taken by the Justices in the opinion in 302 Mass. 605, referred to above, and perhaps because of that doubt the proviso in G. L. c. 30, § 45 (5) (*d*), does not require that the temporary classification and allocation of a new temporary position during the period when the Legislature is not in session be approved by the Joint Committee on Ways and Means, or the House and Senate Committees on Ways and Means. It should be observed here that although the schedules referred to in St. 1959, c. 433, § 6, are described as approved by the Joint Committee on Ways and Means, no delegation of legislative authority is involved, for by enacting a bill with such an incorporation by reference the Legislature as a whole approves the schedules, and does not delegate the power of approval.

The net effect of the provisions of G. L. c. 30, § 45 (5), and the provision of St. 1959, c. 433, § 6, quoted above, is that while the Legislature has forbidden the creation of a new position on a permanent basis, it has left the door open for the Director of Personnel and Standardization during the period when the Legislature is not in session to temporarily classify and allocate any new temporary position the director determines is essential to the service of the Commonwealth, subject to the requirement only that the provisions of c. 30, § 45 (5), cl. (*a*) and (*b*), be complied with.

I must advise you, therefore, in answer to your specific question that a new temporary office or position subject to the classification and pay plans provided by G. L. c. 30, § 45, and essential for the operation of the service of the Commonwealth can be temporarily classified and allocated when the Legislature is not in session, although such office or position has not been included in a schedule of permanent offices and positions approved by the Joint Committee on Ways and Means, a copy of which is on file with the Director of Personnel and Standardization.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The fee for an original real estate broker's, or salesman's, license to be in effect for more than one but less than two years, is to be the yearly rate plus a proportionate part thereof.

NOV. 20, 1959.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration.*

DEAR MADAM: — In your recent letter requesting an opinion you refer to G. L. c. 112, §§ 87XX and 87ZZ, relating to the registration of real estate brokers and salesmen.

After referring to those sections you pose the following question:

"Assume, for example, that a broker's birth date is April 28. The original license to be issued to that individual will bear an effective date as of January 1, 1960, and an expiration date of April 28, 1961. The Board of Registration of Real Estate Brokers and Salesmen requests your opinion on the following question:

"In this case does the original fee of $15 cover the entire period from January 1, 1960, to April 28, 1961, or should there be added to the $15 a proportional fee to cover the four months of 1961?"

Section 87XX refers to the issuance of licenses to applicants to act as real estate brokers or salesmen as the case may be. The section concludes with the following sentence:

". . . Notwithstanding the foregoing, the license originally issued to an individual shall be valid until the anniversary of the licensee's date of birth next occurring more than twelve months after the date of issuance. The board shall keep a record of all licensed brokers and salesmen which shall be open to inspection by the public."

Section 87ZZ reads as follows:

"The following fees shall be paid by individuals *in advance* to the board: —

"(*a*) For each *examination* for a broker's license, *ten* dollars; for each *examination* for a salesman's license, five dollars; provided, however, that a veteran holding an honorable discharge or a blind person shall not be required to pay any examination fee.

"(*b*) For *issuance* of a broker's license, *original, at the rate of fifteen dollars for twelve months;* renewal, ten dollars . . .

"(*c*) For *issuance* of a salesman's license, *original, at the rate of ten dollars for twelve months;* renewal, five dollars . . .

"(*d*) (As inserted by St. 1959, c. 455.) The applicable fee for the issuance of a license shall be adjusted by the board on the basis of each month during which the license originally issued would be valid unless revoked or suspended and, for this purpose, any part of a month shall be considered as a full month."

You will notice from the foregoing that the fee for examination for a broker's license is a flat ten dollars and for examination for a salesman's license, a flat five dollars. Moreover, you will observe that in subdivision (*b*) it is provided that the fee for issuance for a broker's license, original, is to be "*at the rate of* fifteen dollars for twelve months" and the fee for renewal thereof is a flat sum of ten dollars.

Under subsection (*c*) the fee for issuance of a salesman's license, original, is "*at the rate of* ten dollars for twelve months" and for renewal, five dollars. Subsection (*d*) as you have seen provides that "the applicable fee *for the issuance of a license shall be adjusted by the board on the basis of each month during which the license originally issued would be valid unless revoked or suspended* and, for this purpose, any part of a month shall be considered as a full month" (Emphasis supplied).

A careful reading, then, of §§ 87XX and 87ZZ inevitably leads one to the conclusion that since the original licenses referred to in § 87ZZ run for a year and until the next birthday of the applicant and the fees for original licenses are to be *at the rate of* fifteen dollars for twelve months

in the case of a broker's license and *at the rate of* ten dollars for twelve months in the case of a salesman's license, all payable "in advance," the original fee for a broker's license in the suppositious case you refer to should be fifteen dollars plus the proportional fee to cover the four months until the applicant's birthday.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

BY FRED W. FISHER,
Assistant Attorney General.

A local Housing Authority has the power to take real estate owned by a railroad when the taking will not seriously interfere with the enjoyment of the franchise.

NOV. 23, 1959.

MR. FRANK W. MORRIS, *Director of Housing and Renewal, State Housing Board.*

DEAR SIR: — You have presented to this office the request of the Wilmington Housing Authority for an opinion as to its power to take by eminent domain certain real estate owned by the Boston & Maine Railroad "and adjacent to their tracks and right of way . . ." in Wilmington.

You attached to your letter the file which the Authority submitted to you, and Exhibits "A to D" outlining the project site and the opinion of the Authority's attorney on the question of the extent of its powers to take railroad property for urban redevelopment purposes.

General Laws c. 121, §§ 26I to 26CCC, constitutes the Housing Authority Law. The various sections thereof provide for the creation of local housing authorities to carry out housing and other projects. One of the main purposes of the law is the elimination of substandard, decadent or blighted open areas, as defined in § 26J, and in § 26JJ. After declaring the menace of such areas and the need for eliminating them and the resulting evils therefrom, it is declared

"that the acquisition of property for the purpose of eliminating substandard, decadent or blighted open conditions thereon and preventing recurrence of such conditions in the area, the removal of structures and improvement of sites, the disposition of the property for redevelopment incidental to the foregoing, the exercise of powers by housing authorities or redevelopment authorities and any assistance which may be given by cities and towns or any other public bodies in connection therewith, are public uses and purposes for which public money may be expended *and the power of eminent domain exercised;* that a public exigency exists which makes the acquisition, planning, clearance, rehabilitation or rebuilding of such sub-standard and decadent areas for residential, governmental, recreational, business, commercial, industrial or other purposes, including the provision of streets, parks, recreational areas and other open spaces, and of such blighted open areas for residential, commercial, industrial or

recreational and appurtenant or incidental facilities, public uses and benefits *for which private property may be acquired by eminent domain* or regulated by wholesome and reasonable orders, laws and directions and for which public funds may be expended for the good and welfare of this commonwealth; and the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination." (Emphasis supplied.)

In § 26P, among other powers, housing authorities are given the following powers: —

"to take by eminent domain under chapter seventy-nine or chapter eighty A, or to purchase or lease, or to acquire by gift, bequest or grant, and hold, *any property real or personal, or any interest therein, found by it to be necessary or reasonably required to carry out the purposes of the Housing Authority Law, or any of its sections*, and to sell, exchange, transfer or assign the same; provided, that in case of a taking by eminent domain under said chapter seventy-nine, the provisions of section forty of said chapter shall be applicable, except that the security therein required shall be deposited with the mayor of the city or the selectmen of the town in which the property to be taken is situated; . . . (Emphasis supplied.)

Section 26YY authorizes a housing authority in a municipality in which there is no redevelopment authority to undertake urban renewal projects, and provides that projects include undertakings and activities for "the elimination (and for the prevention of the development or spread) of substandard, decadent or blighted open areas, and may involve any work or undertaking for such purpose constituting a land assembly and redevelopment project or any rehabilitation or conservation work or any combination of such undertaking or work." The section further provides that:

"As used in sections twenty-six XX to twenty-six BBB, inclusive, 'rehabilitation or conservation work' may include the restoration and renewal of a substandard, decadent or blighted open area, or portion thereof, in accordance with an urban renewal plan by (1) carrying out plans for a program of voluntary repair and rehabilitation of buildings or other improvements; (2) *acquisition by gift or purchase or by eminent domain of real property and demolition, removal or rehabilitation of buildings and improvements thereon where necessary to eliminate unhealthful, unsanitary or unsafe conditions, lessen density, mitigate or eliminate traffic congestion, reduce traffic hazards, eliminate obsolete or other uses detrimental to the public welfare, or to otherwise remove or prevent the spread of blight or deterioration, or to provide land for needed public facilities;* (3) installation, construction or reconstruction of streets, utilities, parks, playgrounds and other improvements necessary for carrying out the objectives of the urban renewal project; and (4) the disposition, for uses in accordance with the objectives of the urban renewal project of any property or part thereof acquired in the area of such project; provided, that such disposition shall be in the manner prescribed in the housing authority law for the disposition of property in a land assembly and redevelopment project area." (Emphasis supplied.)

Section 26ZZ provides further conditions as to the undertaking of urban renewal projects designed to have each project considered in rela-

tion to the general plan for the municipality. It is also specifically provided that the Housing Board shall not approve an urban renewal plan unless it finds that "(*d*) the project area is a substandard, decadent or blighted open area . . ." Section 26WW, contains a legislative declaration of the objects of urban renewal projects, which incorporates by reference and reaffirms the declarations made in § 26JJ.

General Laws c. 79, provides a uniform system of procedure for taking land by eminent domain. *Watertown* v. *Dana*, 255 Mass. 67.

Although § 5 of c. 79 contains certain restrictions on the taking of certain State lands, highway, public building, cemetery or park land, there is no general prohibition in the section against the taking of property devoted to one public use for another public use.

In the case of *Eldridge* v. *County Commissioners*, 185 Mass. 186, at page 188, the court says: —

"It is a general rule that land acquired under the right of eminent domain for a public use cannot be appropriated to a different public use *which is inconsistent with that to which it was first appropriated*, unless the intention of the Legislature so to appropriate it is plainly expressed. *Old Colony Railroad* v. *Framingham Water Co.* 153 Mass. 561. *Boston & Albany Railroad* v. *Cambridge*, 166 Mass. 224. But where the new use is not necessarily inconsistent with the old one, authority to take for the new use may be inferred from slight indications of intention. *Boston* v. *Brookline*, 156 Mass. 172. *Old Colony Railroad* v. *Framingham Water Co., ubi supra.*" (Emphasis supplied.)

Further, on the same page, the court, after stating that the law has long recognized the right of the public to lay out ways across railroads, states that the reason for permitting the exercise of the right to take lands which are located by a railroad company "outside of the line of the railroad for incidental uses, and which are subject to taxation because these uses are not so strictly public as that of the railroad itself, are stronger than the reasons for permitting ways across railroads," and says: —

"This statute authorizing such improvements has stood without limitation for nearly fifty years. It contains ample provisions for compensation for those whose property is damaged by proceedings under it. We are of opinion that it gives authority to lay out a way over land located for railroad purposes *outside of the location of the railroad itself.*" (Emphasis supplied.)

While it is undoubtedly true that a general authority to take by eminent domain would not authorize a taking of the railroad property which would tend to deprive a railroad company of the full exercise of its franchise, there is no reason why a general authority to take should not be sufficient to take railroad lands outside the line of the railroad where the land is not actually necessary to the enjoyment of the franchise of the railroad. *Old Colony Railroad Co.* v. *Framingham Water Co.*, 153 Mass. 561.

At pages 564 and 565, of the report of the case last cited, the court says:

"In considering what was the intention of the Legislature in regard to taking the plaintiff's land, the use to which it was then being put must not be overlooked. While it was properly procured and rightly held for the accommodation of the plaintiff's growing business at the station, it was not necessary to the enjoyment of the plaintiff's franchise, and was not then

actually being used at all. The rights intended to be given by the statute are not the same in reference to this land as in reference to land over which the main tracks of the railroad are laid. It may well be held that this statute does not go far enough to authorize the taking of land without which the plaintiff could not operate its railroad. *Boston Water Power Co.* v. *Boston & Worcester Railroad*, 23 Pick. 360. But the case last cited is an authority which decides that, by mere implication and without express statement, the Legislature may be held in a given case to have authorized the taking of land held by a corporation for a public use where the taking does not seriously interfere with the enjoyment by the corporation of its franchise. In the present case the judge found that the land taken is not indispensably necessary for the purposes of the plaintiff, and the plaintiff's conduct in consenting to the erection of the defendant's works, and in permitting them to remain there a long time without objection, shows the same thing. The judge found at the trial, that the place selected by the defendant for its pumping station was the most suitable and proper place for it, although it would not have been impracticable to put it elsewhere. "*In view of all the circumstances, we are of opinion that the statute authorized the defendant to take the plaintiff's land for the public use to which it is now being put.*" (Emphasis supplied.)

With regard to the authority to take the lands of the Boston & Maine Railroad in Wilmington to which your inquiry refers, although the Housing Authority Law does not expressly state that railroad property can be taken, it does expressly state that substandard, decadent and blighted open areas can be taken, and, in fact, that they should be taken, if necessary, for their elimination. If, as evidently the Wilmington Housing Authority has found, the land of the railroad which the Authority has included within the urban renewal project in question is part of a substandard, decadent and blighted area, or required to be taken for the elimination of such an area, the right to take is not dependent on mere implication but is, in effect, expressly authorized.

I advise you, therefore, that, in my opinion, the Wilmington Housing Authority would not have the right to make any takings within the operating right of way of the railroad but that it would have the right to take any land owned by the railroad which the Authority has found is part of a substandard, decadent or blighted open area, the taking of which will not seriously interfere with the enjoyment by the corporation of its franchise.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By JAMES J. KELLEHER,
Assistant Attorney General.

A real estate agency is a "place of public accommodation" within the statutes (G. L. c. 273, §§ 92A and 98) penalizing discrimination because of color, etc.

Nov. 24, 1959.

Mrs. Mildred H. Mahoney, *Chairman, Commission Against Discrimination.*

Dear Madam: — You indicate that the Commission Against Discrimination has before it affidavits filed against two real estate agencies alleging discrimination because of color. One affidavit concerns the rental of an apartment in a two-family house owned and managed by a real estate agency which manages and owns a large number of such properties throughout the Commonwealth. Because, however, the house in question is not contiguous to eight other rental units controlled by the respondent it is not covered by the recently enacted "fair housing law." (St. 1959, c. 239.)

The second affidavit was filed by the owner of a single family dwelling. He alleges that a real estate agency refused to show his house to prospective Negro buyers.

You further indicate that your commission anticipates that it will continue to receive affidavits alleging discriminatory practices by real estate agencies regarding properties not covered by the housing amendment to the Fair Housing Practice Law.

You request, therefore, my opinion on the following question:

"Would the Commission in accepting jurisdiction under the Public Accommodations Law of complaints filed against real estate agencies which allege discrimination because of religion, color or race be abusing its discretion or acting arbitrarily or capriciously or otherwise not in accordance with law?"

Under G. L. c. 151B, as amended, the Commission Against Discrimination is vested with jurisdiction of the "Public Accommodations Law," so called. That law is found in G. L. c. 272, §§ 92A and 98.

Section 92A reads:

"No owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement shall, directly or indirectly, by himself or another, publish, issue, circulate, distribute or display, or cause to be published, issued, circulated, distributed or displayed, in any way, any advertisement, circular, folder, book, pamphlet, written, or painted or printed notice or sign, of any kind or description, intended to discriminate against or actually discriminating against persons of any religious sect, creed, class, race, color, denomination or nationality, in the full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public by such places of public accommodation, resort or amusement; provided, that nothing herein contained shall be construed to prohibit the mailing to any person of a private communication in writing, in response to his specific written inquiry.

"A place of public accommodation, resort or amusement within the meaning hereof shall be defined as and shall be deemed to include any place, whether licensed or unlicensed, *which is open to and accepts or solicits the patronage of the general public* and, without limiting the generality of the

definition, whether or not it be (1) an inn, tavern, hotel, shelter, roadhouse, motel, trailer camp or resort for transient or permanent guests or patrons seeking housing or lodging, food, drink, entertainment, health, recreation or rest; (2) a carrier, conveyance or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto; (3) a gas station, garage, retail store or *establishment, including those dispensing personal services*; (4) a restaurant, bar or eating place, where food, beverages, confections or their derivatives are sold for consumption on or off the premises; (5) a rest room, barber shop, beauty parlor, bathhouse, seashore facilities or swimming pool; (6) a boardwalk or other public highway; (7) an auditorium, theatre, music hall, meeting place or hall, including the common halls of buildings; (8) a place of public amusement, recreation, sport, exercise or entertainment; (9) a public library, museum or planetarium; or (10) a hospital, dispensary or clinic operating for profit; provided, however, that no place shall be deemed to be a place of public accommodation, resort or amusement which is owned or operated by a club or institution whose products or facilities or services are available only to its members and their guests nor by any religious, racial or denominational institution or organization, nor by any organization operated for charitable or educational purposes.

"Any person who shall violate any provision of this section, or who shall aid in or incite, cause or bring about, in whole or in part, such a violation shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days, or both." (Emphasis supplied.)

Section 98 reads:

"Whoever makes any distinction, discrimination or restriction on account of religion, color or race, except for good cause applicable alike to all persons of every religion, color and race, relative to the admission of any person to, or his treatment in, any place of public accommodation, resort or amusement, as defined in section ninety-two A of chapter two hundred and seventy-two, or whoever aids or incites such distinction, discrimination or restriction, shall be punished by a fine of not more than three hundred dollars or by imprisonment for not more than one year, or both, and shall forfeit to any person aggrieved thereby not less than one hundred nor more than five hundred dollars; but such person so aggrieved shall not recover against more than one person by reason of any one act of distinction, discrimination or restriction. All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. This right is recognized and declared to be a civil right."

Although to date twenty-four States have enacted Public Accommodations laws similar in their scope to the Massachusetts law, inquiry and research have uncovered no decided court cases bearing on the issue herein posed. However, the Connecticut Commission on Civil Rights, on December 15, 1955, ruled that under its interpretation of the Connecticut Public Accommodations statute a real estate agent is covered under the definition of a place of public accommodation as "an establishment which caters or offers its services or facilities or goods to the general public" within the meaning of that law.

It is significant that in the four years which have elapsed since the promulgation of the Connecticut ruling there has been no challenge to it in that State.

Obviously, a real estate agency is a ". . . place which is open to and accepts or solicits the patronage of the general public . . ." and it may well be that a real estate agency is an "establishment" in the business of "dispensing personal services." Finally, a real estate agency does not come within the clearly defined exceptions of a private club or a religious, racial, denominational, charitable or educational use set out in the Massachusetts statute.

In view of the wording of our Public Accommodations statute, both standing alone and in the context of the broad and long-standing public policy established by the Massachusetts General Court to prohibit racial, religious and ethnic national discrimination, it would seem, and I so rule, that it is a violation for a real estate agency to refuse to offer its services to any person or to refuse to accommodate any person as a client because of his race, creed or color.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

Senate Committee on Rules authorized by statute to fix employees' salaries may approve salaries in excess of specific appropriations; in no event, however, may the total periodic payments exceed the amount appropriated.

Nov. 25, 1959.

Hon. FREDERICK J. SHEEHAN, *State Comptroller.*

DEAR SIR: — You have written me enclosing a copy of a letter dated November 9, 1959, sent to you by the President of the Senate advising you that the Senate Committee on Rules has voted to increase, as of July 1, 1959, the salaries of the following employees under its approval and listed below:

Account No.	Code	Position	Salary Authorized
0101–02	98–009	Clerk of the Senate	$13,000
0101–03	98–011	Assistant Clerk of the Senate	10,500
0101–04	98–013	Clerical Assistant, Senate	8,280
	98–098	Index Clerk, Senate	6,200

You direct my attention to the following items which appear in St. 1959, c. 433, the general appropriation act for the current fiscal year which was enacted on July 31, 1959.

0101–02	For the salary of the clerk of the senate	$12,000
0101–04	For clerical assistance to the clerk of the senate, including not more than two permanent positions	12,480

After referring to the form of certification on pay rolls signed by the public officers authorized to approve them, which reads as follows, —

"I hereby certify under the penalties of perjury that the persons listed on the attached Pay Roll supporting this voucher are entitled to the amount appearing against their respective names; that the services were properly authorized and were rendered during the period stated and are properly chargeable to the appropriation designated; that sufficient funds are available; and that this Pay Roll voucher of ..... sheets is hereby approved in the sum of ....."

you quote the following portion of G. L. c. 29, § 18, —

"Except as otherwise provided, no money shall be paid by the commonwealth without a warrant from the governor drawn in accordance with an appropriation then in effect, and after the demand or account to be paid has been certified by the comptroller; . . ."

and then ask:

"In view of the provisions of this section and also G. L. c. 29, §§ 26 and 27, c. 30, § 46 (9), and the opinion of the Attorney General dated December 7, 1937, to His Excellency the Governor and the Honorable Council, and the opinion of the Justices of the Supreme Court to the House of Representatives in Massachusetts Reports, Volume 323, page 764, I respectfully request your opinion on the following:

"1. Where the Legislature has made an appropriation item for the salary of one position under a single item for the fiscal year, may the Comptroller certify a warrant at a monthly rate based on an approved yearly salary in excess of the individual appropriation item?

"2. Where the Legislature has made an appropriation for two permanent positions in a fixed amount for the fiscal year, may the Comptroller certify a warrant to the Governor and Council when the monthly rate for the two employees is based on yearly salaries fixed in excess of the amount set forth in the appropriation item?

"3. Where the Legislature has made an appropriation for a fiscal year for more than two permanent positions and included in said item funds available for expenses as well as salaries and subsequently salaries of individuals properly chargeable to this item are legally authorized by the Legislature to be increased over the amount upon which the appropriation item was based, and this office is in receipt of a certification from the head of a department, agency or commission that there are sufficient funds available to pay said salaries, may the Comptroller certify a warrant to the Governor and Council calling for the payment of said salaries as certified by the head of the department?"

First, I would like to point out to you that the conclusion stated in the opinion of Attorney General Paul A. Dever, dated December 7, 1937, to His Excellency the Governor and the Honorable Council to which you refer, that the Governor and Council had no authority to approve an increase in the salary of the State Librarian which made his salary greater than the amount stated in an item of the general appropriation act for the fiscal year in which the increase was voted providing for the Librarian's salary for that fiscal year, is inconsistent with *Opinion of the Justices*, in 323 Mass. 764, to which you also refer. That opinion held that the valid-

ity of an act of the Legislature, passed after the enactment of the general appropriation act for the fiscal year 1948–1949, providing for a percentage increase in the salaries of all State officers and employees for that fiscal year, was not affected by the fact that no funds other than those provided by the general appropriation act were made available for payment of the expenditures authorized and the fact that it called for expenditures in excess of the amounts made available in the general appropriation act.

At page 768, the Justices said:

"What will happen when any appropriations now in existence applicable to the payment of the increased salaries are exhausted, if no new appropriations applicable thereto are by that time made, is a matter not within the scope of the questions submitted."

The Senate Committee on Rules is given express statutory authority by G. L. c. 3, §§ 12 and 13, to fix the salaries of the various persons referred to in the letter to you from the President of the Senate. Having that authority the committee may approve increases in the salaries of the personnel referred to. What the effect of the vote is as regards the payments to be made to the persons involved is another question.

It is clear that in no event can any amount in excess of the total of an appropriation item be expended. That is definitely shown by the provision of G. L. c. 29, § 26, that "expenses of offices and departments for compensation of officers, members and employees and for other purposes *shall not exceed the appropriation made therefor by the general court . . .*" (Emphasis supplied.)

The Justices in the discussion in the opinion in 323 Mass. 764, point out, at page 767, that:

"The General Court has by statute imposed rigid restrictions upon the incurring of liability by municipal corporations in excess of appropriations made. G. L. (Ter. Ed.) c. 44, § 31, as appearing in St. 1946, c. 358, § 23. G. L. (Ter. Ed.) c. 44, § 33A, as appearing in St. 1947, c. 298, § 1. See *McHenry* v. *Lawrence*, 295 Mass. 119; *Barnard* v. *Lynn*, 295 Mass. 144; *Rock* v. *Pittsfield*, 316 Mass. 348; *Allen* v. *Lawrence*, 318 Mass. 210, 213, 215. Similar rigid restrictions are imposed upon State officers. G. L. (Ter. Ed.), c. 29, § 26, as appearing in St. 1947, c. 636, § 1. G. L. (Ter. Ed.) c. 29, § 27, as appearing in St. 1947, c. 636, § 2. See *Baker* v. *Commonwealth*, 312 Mass. 490, 492–493."

It would appear that the word "similar" was used advisedly by the Justices in lieu of the word "same." It has been held under G. L. c. 44, §§ 31 and 33A, that municipal officers cannot incur a liability which may exceed a particular appropriation item. That rule has, however, been held not to prevent school committees from voting increases in salaries the payment of which requires expenditures in excess of the amounts appropriated for services where, by omitting or decreasing expenditures for other appropriation items, the total amount appropriated for all school purposes is not exceeded. Because of the significantly different phraseology of G. L. c. 29, §§ 26 and 27, applicable to State officers, it cannot be ruled that a State officer having express authority to fix a salary cannot exercise that authority by fixing a salary in excess of an amount made available by an item of the general appropriation act. The effect of the provisions of G. L. c. 29, §§ 26 and 27, is similar to that referred to by the Justices in

the opinion in 323 Mass 764, and in the situation to which your inquiry relates, is, that while the Senate Committee on Ways and Means can fix a salary the payment of which will require an expenditure in excess of the amount appropriated for the position, if the appropriation available for the payment of the salary becomes exhausted before the end of the fiscal year by expenditures at the increased rate, no further payments can be made unless new appropriations applicable thereto are made by that time.

General Laws c. 30, § 46 (9), to which you refer, is applicable only to positions which are subject to the provisions of §§ 45 to 50, inclusive, of said c. 30. The positions to which your letter refers, which are in the legislative branch, are not subject to those sections, and the provisions of St. 1959, c. 433, § 6, are not, in my opinion, to be construed as applying to positions in the legislative branch.

The opinion expressed herein, that State officers expressly authorized by statute to fix the salary of a subordinate may establish a salary in excess of the amount appropriated by the General Court for the salary of the position, is in accord with an opinion dated December 29, 1947, of Attorney General Clarence A. Barnes, to the Board of Probation (see Attorney General's Report, 1948, pp. 42, 43). The additional holding in the opinion referred to that the provision of the general appropriation act for the fiscal year in which the increase was voted which is comparable to the provisions of St. 1959, c. 433, § 6, referred to above, prevented payment of the increase, is not applicable here since, as stated, positions in the legislative branch are not within the operation of the provisions of said § 6.

In accordance with the foregoing, I answer each of your three specific questions in the affirmative, but add that in no event may the amount to be expended in payment of the salaries fixed by the committee exceed the amounts appropriated in specific appropriation items of St. 1959, c. 433, § 6, providing funds for the payment of the salary of any of the positions involved, unless additional appropriations therefor are made.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The Alcoholic Beverages Control Commission had discretion to approve the transfer of a "Package Goods Store" license to a location near a church or school, where such premises had previously been licensed, under St. 1954, c. 569, § 2, exempting such premises from G. L. c. 138, § 16C, the license being transferred from similarly exempt premises taken by eminent domain.

DEC. 4, 1959.

MR. JAMES P. RILEY, *Acting Secretary, Alcoholic Beverages Control Commission.*

DEAR SIR: — The Alcoholic Beverages Control Commission has requested my opinion as to the legality of issuing a "Package Goods" store license for the sale of wines and malt beverages at a location within 500 feet of a church and school, which location was previously, during the year 1935, licensed as a "Package Goods" store for the sale of malt beverages.

This question involves the interpretation of § 2 of c. 569 of the Acts of 1954. Section 1 of said c. 569 inserted a new § 16C in G. L. c. 138. Said section 16C provides that "Premises, except those of an innholder, located within five hundred feet, measured along public ways, of a church or school shall not be licensed for the sale of alcoholic beverages; . . ."

Section 2 of c. 569 of the Acts of 1954 provided as follows:

"The provisions of section sixteen C of chapter one hundred and thirty-eight of the General Laws, inserted by section one of this act, shall not apply to premises which, prior to the effective date of this act, or prior to the establishment of a church or school within five hundred feet thereof, were licensed for the sale of alcoholic beverages."

A proper interpretation of these sections can only be made with reference to the entire Liquor Control Act of which these sections are a part.

In § 23 of c. 138 the policy of the act is set forth in clear terms:

". . . The provisions for the issue of licenses and permits hereunder imply no intention to create rights generally for persons to engage or continue in the transaction of the business authorized by the licenses or permits respectively, but are enacted with a view only to meet the reasonable demand of the public for pure alcoholic beverages and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made."

This section confers upon the licensing authorities a broad discretion in the licensing of premises for the sale of alcoholic beverages. This discretion was granted in recognition of the fact that the public interest would best be served by determining each license application on its own merits.

In the facts of this matter it appears that the present licensee is seeking a transfer from his present location (which is within 500 feet of a church or school) to a new location a short distance away and slightly closer to the church or school because of the fact that his present location is being taken by public authority.

Section 23B of the act provides in such an instance:

"Any holder of a license issued under this chapter to do business on certain premises which are subsequently taken by public authority and who is required to remove his business from such premises shall not thereby be deprived of his license. Such licensee may apply to the local licensing authorities for a transfer of the license to another location, and in the event that a suitable location is not available which is approved by the licensing authorities, said license shall be reserved for the licensee until such time as a suitable location is approved, but in no event shall such license be reserved for a period longer than four years from the date of the taking. . . ."

It is my opinion that this is a case in which the commission must decide how the public interest would best be served.

A narrow interpretation of the wording employed in § 2 of c. 569 is not warranted. If the Legislature intended to restrict the exclusion to those premises licensed as of the effective date of the act, it would have said so.

It is obvious to me that it left the decision, as to whether or not the previous license was so remote in time as to warrant the commission to issue such a license based on this exclusion, to the sound discretion of the commission.

It is my opinion that the wording of § 2 requires the interpretation that premises which were licensed for the sale of alcoholic beverages prior to the effective date of the statute (January 1, 1956 — see St. 1954, c. 569, § 3) are eligible to be licensed. The clear meaning of this language is that the premises in question, having been licensed during the year 1935, were licensed prior to the effective date of the act, and therefore the issuance of a "Package Goods" store license to these premises at this time would not be in violation of G. L. c. 138, § 16C.

Under the foregoing circumstances, it is my opinion that the legislation in question, as a matter of law, does authorize your commission to approve the transfer in question if such transfer appears to be justified in the light of the public interest involved. It is the responsibility of your commission to make the factual determination as to this public interest. The Department of the Attorney General has not been given the function of determining this question of fact or of determining the relative merits of whether the transfer in question should be granted or not. As a matter of law, it appears that the transfer may be made. Whether or not it should be made is for your determination.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The provisions of G. L. c. 112, § 81M, that certificates of registration "shall authorize the practice of . . . " the regulated calling, have reference to the legal effect of the certificates, not to their recitals.

DEC. 10, 1959.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration.*

DEAR MADAM: — In your recent letter you refer to G. L. c. 112, § 81M, as amended by St. 1958, c. 584, § 7, which provides

". . . In the case of a registered professional engineer, the certificate shall authorize the practice of engineering. . . . In the case of a registered land surveyor, the certificate shall authorize the practice of land surveying. . . ."

and request my opinion whether the phrase "authorize the practice of engineering" or "authorize the practice of land surveying" should be incorporated into the wording of the certificate to be issued to registrants.

The provision of G. L. c. 112, § 81M, quoted above, is to be construed as a legislative declaration of the legal effect of the certificate issued by the Board of Registration of Professional Engineers and Land Surveyors and the authority to practice thereby acquired by an applicant to whom a certificate is issued. The provision referred to does not require that the

certificate issued state on its face that the registrant is thereby authorized to practice professional engineering, in the case of a person so registered, or land surveying, in the case of a person issued a certificate as a registered land surveyor.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

BY JAMES J. KELLEHER,
Assistant Attorney General.

The Commission on Administration and Finance has authority to regulate the use of State-owned motor vehicles, but the legal complications which would result negative its right to require reimbursement for the permitted use of a State-owned vehicle between the office and home.

DEC. 22, 1959.

HON. CHARLES FRANCIS MAHONEY, *Commissioner of Administration.*

DEAR SIR: — You have requested my opinion on the following questions:

"1. Does the Commission have authority under St. 1959, c. 433, § 5, and other provisions of law to issue and enforce the proposed regulations as contained in the attached copy?

"2. If your reply is negative with respect to any paragraph or paragraphs of the proposed regulation, does the Commission have the authority to proceed with the rest of the bulletin?"

In order to further clarify and identify the particular request made by your office, the bulletin referred to and enclosed with your letter bears the caption "Administrative Bulletin No. ——— For approval by Commission on Administration & Finance, Oct. 28, 1959," the provisions of which are herein incorporated by reference. The proposed regulations set forth in the Administrative Bulletin have to do with the use of State-owned motor vehicles.

There does not appear to be any doubt that the Commission on Administration and Finance, by means of the various statutes referred to in your request, has the authority to regulate the use and operation of State-owned motor vehicles. Apparently, the specific area in which doubt arises is in the authority of the commission to include within the regulations your proposed paragraph 5 which provides:

"Every person authorized under paragraph 4 (which refers to individuals who have received specific approval from their department head for the use of a vehicle between their domiciles and permanent assignment) to drive a state-owned car from his place of permanent assignment to his domicile shall reimburse the Commonwealth at the rate of five cents a mile for such use of a car."

Although § 5 of c. 433, which provides "No state-owned motor vehicle shall be used for providing transportation for state officers or employees between their domiciles and places of employment nor shall any expense be incurred for the garaging of such vehicles except under regu-

lations approved by the commission on administration and finance," clearly authorizes the commission to control such use by regulation, your paragraph 5 in the proposed regulations, in our opinion, falls without the authorization set forth in said § 5. This proposed regulation demands that the employee reimburse the Commonwealth at the rate of five cents a mile for such use of a car and therefore creates a lease situation wherein the Commonwealth is the lessor and the employee is the lessee. No such leasing arrangement may be entered into without specific legislative authority. In addition, this regulation creates the further problem of insurance under the compulsory automobile insurance law of the Commonwealth. Again, no specific authority has been given whereby your commission may make arrangements for such insurance.

As you undoubtedly know, privately owned and operated motor vehicles are required to be insured against personal injury claims under the provisions of G. L. c. 90. In respect to State-owned motor vehicles which would not be covered by compulsory insurance, the General Court has seen fit to work out detailed statutory provisions in G. L. c. 12 §§ 3B and 3C. Under these sections the Attorney General may defend and settle claims arising out of the operation of State-owned motor vehicles by employees acting within the scope of their official duties. The regulation which has been proposed by you would create a situation where State employees would be operating State-owned motor vehicles without the scope of their employment and, thus, members of the public who might be injured by the operation of these motor vehicles would not be entitled to the protection of the aforesaid G. L. c. 12, §§ 3B and 3C.

It is, therefore, submitted that regarding your first question our answer must necessarily be in the negative.

With regard to your second question, it would appear, as indicated above, that the commission does have authority to proceed with the rest of the bulletin.

Very truly yours,

EDWARD J. MCCORMACK, Jr., *Attorney General.*

Under the statute (G. L. c. 32, § 91A) requiring a person retired for disability to report annually before January thirty-first, and refund any excess of pension and earnings over the compensation for his position, computations for a comparison of pension and earnings with compensation, for less than a full year, are to be on a proportionate basis.

JAN. 19, 1960.

HON. CHARLES FRANCIS MAHONEY, *Commissioner of Administration.*

DEAR SIR: — You have requested my opinion relative to the construction of G. L. c. 32, § 91A.

After stating the substance of § 91A, you say that an employee of the Commonwealth was retired under G. L. c. 32, § 57, as of the close of business on February 28, 1959; you further state that his pension is $3949.14 per year or $3290.90 for the ten months of 1959 during which he was on pension; you further state that in addition to his pension he earned $3375 from gainful occupation during the same period, making

a total income from both pension and earnings of $6665.90 between March 1 and December 31, 1959. Moreover, you state that the salary he was receiving at the time of retirement was at the rate of $6474 per year, of which amount, had he remained in the State service, he would have received $5395 for the ten months between March 1 and December 31, 1959.

In the light of the foregoing, you pose the following question:

"Do the words 'the regular compensation which would have been payable to such person in such preceding year had he continued in service' refer to the $6,474, the salary for the full year, or do they refer to the $5,395, the salary which he would have received during the ten months in which he was on pension?"

As you are aware, there are two sections 91A of c. 32 of the General Laws. One, inserted by c. 766 of the Acts of 1957, and c. 684 of the Acts of 1958, approved by the people at the election on November 4, 1958, inserting another § 91A.

So far as your present question goes, I see no need of differentiating between the two. I shall, however, apply the § 91A approved by the people at the election.

This section provides,

"Every person . . . pensioned or retired under any general or special law for disability . . . shall in each year before the last day of January . . . file with the board or officer by whom he was pensioned or retired a statement . . . certifying the full amount of his earnings from gainful occupation during the preceding year. . . ."

This section goes on to provide that if such earnings exceed, or when added to the pension in such preceding year exceed, the regular compensation which would have been payable to such person in such preceding year had he continued in service in the grade held by him when he was pensioned, he shall refund his pension for such preceding year or portion which was equal to such excess, as the case may be.

It should be observed that public interest in the subject matter dealt with by this legislation was so high that we find that there are now two sections 91A upon the statute books. In interpreting § 91A, it should be borne in mind that the only pensions involved are pensions "for disability." Bearing this in mind, the purpose of this legislation seems to be to limit the amount of a public pension for disability paid from public monies to a sum which, together with the earnings of the pensioned employee, will provide for him a total income after retirement at least equal to his income while employed.

In my opinion, if the employee is retired during the year the amounts of his compensation, his earnings and his pension should be prorated accordingly. Applying this formula to the question which you pose — in my opinion a proper construction of § 91A would require the use of the figure $5395 instead of $6474.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

If the Federal Government's share of the cost of equipment for the Civil Defense Agency is paid only after the purchase, the Agency shall contract therefor only if it has funds to pay the full cost, unless the seller agrees to limit the Commonwealth's liability.

JAN. 19 1960.

Col. JOHN J. DEVLIN, *Director, Civil Defense Agency.*

DEAR SIR: — You have requested an opinion concerning the authority of your agency to purchase certain civil defense equipment and supplies. You state that such equipment and supplies are ordinarily procured under a contract awarded by your agency under an arrangement whereby one-half the cost of such equipment and supplies is paid by the Commonwealth and one-half is paid by the Federal Government. The 50 per cent contribution made by the Federal Government has in the past been paid over to the Commonwealth prior to the award of the contract, so that 100 per cent of the funds necessary to pay for the supplies and equipment to be purchased are available in the State Treasury prior to the award of the contract.

You state that the Federal Government now wishes to change its procedure and will not make an advance to the Commonwealth of its 50 per cent share until the bills for the equipment in question have actually been received by the Commonwealth. You call attention to the provisions of G. L. c. 29, § 26, which provide in part as follows:

". . . No obligation incurred by any officer or servant of the commonwealth for any purpose in excess of the appropriation or allotment for such purpose for the office, department or institution which he represents, shall impose any liability upon the commonwealth."

You ask whether you, on behalf of the Commonwealth, may enter into a contract for the purchase of the material in question notwithstanding the fact that the Federal funds are not on hand but are only promised.

We answer this question in the negative. If your agency does not have sufficient funds available to pay for the materials to be purchased, you should not impose a contractual obligation on the Commonwealth to pay for these materials.

In the event this question is answered in the negative, you then ask whether your agency, on behalf of the Commonwealth, could insert a clause in its purchase contract providing that the Commonwealth's liability is limited to 50 per cent of the cost and that the Federal Government is to furnish the balance of the funds necessary.

We answer this question in the affirmative. The procedure suggested by you would impose an obligation on the Commonwealth only to the extent that it has funds available for the purchase. You may encounter some difficulty in awarding a contract on this basis, but an explanation of the matter to the contractors involved may make them willing to contract with the Commonwealth on this conditional basis.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

The Commission on Administration and Finance may approve a lease made by the Superintendent of Buildings, under St. 1957, c. 656, of premises in the Springfield area, providing that the Commonwealth's obligation shall be subject to appropriation, although no appropriation for rent has been made.

JAN. 19, 1960.

HON. CHARLES FRANCIS MAHONEY, *Commissioner of Administration.*

DEAR SIR: — You state that the Commission on Administration and Finance has before it for approval a proposed lease for an office building to be constructed in the city of Springfield. The lease, authorized by the provisions of St. 1957, c. 656, is for a ten-year period commencing on July 1, 1960. You ask whether the commission has authority to approve the lease in view of the fact that there is no appropriation covering rental of this space for the fiscal year 1960 or 1961. You note that the lease contains a provision to the effect that all obligations of the Commonwealth hereunder shall be subject to available appropriations.

Under the circumstances related above, it is my opinion that your commission does have legal authority to approve the lease in question at the present time if it so determines. As a general proposition, your commission is prohibited from imposing obligations on the Commonwealth in the absence of an appropriation because of the provisions of G. L. c. 29, § 26, which state in part as follows:

". . . No obligation incurred by any officer or servant of the commonwealth for any purpose in excess of the appropriation or allotment for such purpose for the office, department or institution which he represents, shall impose any liability upon the commonwealth."

By the provisions of G. L. c. 8, § 10A, this limitation is somewhat relaxed where the Commonwealth's obligation is one to pay rent. The pertinent language is as follows:

"The commonwealth, acting through the executive or administrative head of a state department, commission or board and with the approval of the superintendent and of the governor and council and of the commission on administration and finance, may lease for the use of such department, commission or board, for a term not exceeding five years, premises outside of the state house or other building owned by the commonwealth, if provision for rent of such premises for so much of the term of the lease as falls within the then current fiscal year has been made by appropriation. . . ."

In respect to the particular lease which is now before you for approval, the provisions of G. L. c. 8, § 10A, have been somewhat modified by St. 1957, c. 656, which provides that:

"Notwithstanding the provisions of section ten A of chapter eight of the General Laws, the state superintendent of buildings, with the approval of the governor and council and of the commission on administration and finance, may lease premises for the use of departments, commissions or boards of the commonwealth in the area of Springfield, for a term not exceeding ten years with an option to renew for ten years."

Under this special act it appears that the State Superintendent of Buildings himself executes the lease for the Springfield office building rather

than merely approving such lease, as would be his function under c. 8, § 10A. Likewise, the term of the Springfield lease may be as long as ten years rather than the five years set forth under c. 8, § 10A. In other respects the General Laws of the Commonwealth, not in conflict with this special act, must be observed. As such, the remaining provisions of c. 8, § 10A, relating to appropriations are applicable. As quoted above, these provisions allow an obligation for rent to be incurred; provided, that there is an appropriation "for so much of the term of the lease as falls within the then current fiscal year."

The term of the proposed lease does not commence until July 1, 1960, which date is not in the current fiscal year but is the first day of the ensuing fiscal year. G. L. c. 4, § 7 (9).

Since none of the term is in the current fiscal year, there need be no rent appropriation for the current fiscal year. The lease in question, therefore, may be approved at the present time without conflicting with the provisions of c. 8, § 10A.

Although a lease for several years may be negotiated on behalf of the Commonwealth as lessee, even though the rent for future years has not then been appropriated, the right of a lessor to be paid such future accruing rents is dependent on future appropriations being made by the Legislature. Even if suit is instituted against the Commonwealth for such future rents, recovery is expressly limited by G. L. c. 258, § 3, which provides that judgments against the Commonwealth shall be paid by the Treasurer "from any appropriations made for the purpose by the General Court."

If the lessor is in fact ignorant of the statutory provisions recited above, this limitation on the authority of officers contracting on behalf of the Commonwealth has been brought to his attention quite clearly by the language in the proposed lease which states that "all obligations of the commonwealth hereunder shall be subject to available appropriations."

In conclusion, it is my opinion that your commission may approve the proposed lease at the present if it so determines.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The State Department of Public Works is not authorized under G. L. c. 91, §§ 11 or 31, to reconstruct privately owned dams; waterway projects thereunder must be in public ownership.

JAN. 20, 1960.

MR. RODOLPHE G. BESSETTE, *Director, Division of Waterways, Department of Public Works.*

DEAR SIR: — You have requested an opinion as to whether or not your department has the authority under G. L. c. 91 to reconstruct the privately owned dam of the Whitinsville Water Co. located in Sutton.

General Laws c. 91, § 11, as amended, provides that:

"The department shall undertake such construction and work for the improvement, development, maintenance and protection of tidal and non-tidal rivers and streams, great ponds, harbors, tide waters, foreshores and shores along a public beach as it deems reasonable and proper, and for this purpose shall have the same powers conferred upon it by section thirty-one.

The department, in pursuance of the work authorized, may construct, reconstruct, alter and repair bridges, culverts, conduits, pipes, walls and dams, and may do such other incidental work as may be deemed necessary for the improvement and safety of waterways. In selecting the places to do such work, the department shall consider the general public advantage of the proposed work, the local interest therein as manifested by municipal or other contributions therefor, the importance of the industrial or commercial and other interests to be especially served thereby, and any other material considerations affecting the feasibility, necessity or advantage of the proposed work or the expenditures therefor. . . ."

Chapter 91, § 31, provides:

"The department may make surveys and improvements for the preservation of harbors and may repair damages occasioned by storms or other destructive agencies along the coast line or river banks of the commonwealth, and may take by eminent domain under chapter seventy-nine or acquire by purchase or otherwise, in the name and behalf of the commonwealth, any land or materials necessary for making such improvements or repairs. . . ."

Your letter indicates, among other things, that the water supply protected by the dam is used by the towns of Whitinsville and Northbridge although located in the town of Sutton. It further states that the town of Sutton has furnished a bond of indemnity to the department for any claims for damage resulting from the work and that the voters of the town of Northbridge have authorized the selectmen of that town to accept a payment from the water company for one-half the cost of reconstructing the dam, this amount to be transferred by the town to the Commonwealth.

It is assumed that these factors are advanced to show compliance with the provisions of § 11 of c. 91 and the regulations of the department, relative to local participation in the cost of the work, indemnification for damages and the general public advantage or importance to industrial or commercial interests. These factors alone are not the controlling elements as to the authority for doing work contemplated under c. 91; they are merely guideposts in selecting the places where work may be done.

The question propounded by your inquiry is whether or not your department has the authority to reconstruct a privately owned dam which operates for profit and as an incident thereto furnishes water to one or more municipalities. The answer is in the negative.

I find no authority in §§ 11 or 31 of c. 91 for your department to reconstruct this dam on privately owned property. The provisions of §§ 11 and 31 clearly indicate that one of the essential requirements for construction or work under the provisions of these sections is public ownership; and the language of both sections vests the department with the right of eminent domain to accomplish such ownership.

This opinion is consistent with an opinion given by Attorney General George Fingold to the Commissioner of Public Works, October 27, 1954. Attorney General's Report, 1955, p. 53.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

BY CHARLES E. FRAZIER, JR.,
Assistant Attorney General.

Estimate of expenditures and recommendations of allotments for a State agency must be based on salaries as increased by the Legislature even though it appears that the amount appropriated may not be sufficient for the full payment of the salaries as increased for the full fiscal period.

JAN. 21, 1960.

MR. KERMIT C. MORRISSEY, *Budget Commissioner.*

DEAR SIR: — You have asked my opinion on certain questions relating to allotments of appropriations under G. L. c. 29, § 9B. The questions arise since the total amount available for the payment of the salaries of the permanent positions authorized by the Legislature for a particular State agency is insufficient for their payment in full for the current fiscal year because of increases granted by the Legislature under St. 1959, c. 433, § 6.

You state that the Commission on Administration and Finance has received a request from the State agency that it recommend an allotment in its subsidiary account 01, Salaries, Permanent Positions, to cover the salary increases so authorized. Although you refer to a request to the commission from the State agency that the commission recommend an allotment to pay the increases, I assume that you refer to the detailed estimate of anticipated expenditures for an allotment period required to be submitted to you under G. L. c. 29, § 9B, in advance of the request to the commission by the Governor for the recommendation required to be made to him by the commission. Again, although you state that the request is for an allotment to cover salary increases authorized by the Legislature under St. 1959, c. 433, § 6, I assume you mean that the agency has submitted an estimate of anticipated expenditures for the full payment, or for making up the full payment, of the salaries for the permanent positions at the rates approved by the Legislature for the allotment period or periods covered.

You state that:

"A review of the request indicates that although the requested allotment to cover these salary increases does not exceed the available funds in the subsidiary account, it will result in insufficient funds remaining in said subsidiary account to meet the salaries of permanent employees in the final allotment period."

The situation appears to be that the Legislature has made available for the payment of salaries of permanent positions in the agency at the rates authorized by the same act in which the funds were made available, less money than will be required for the payment of the salaries as authorized for the fiscal year, if it is assumed that there will be no changes in personnel by retirement, resignation, etc., during the year.

A somewhat similar situation was dealt with in *Opinion of the Justices*, 323 Mass. 764. There the Justices held that it was constitutionally competent for the General Court to pass a bill increasing salaries, even though it called for the expenditure of State money in excess of available resources, without providing specific means of payment. The Justices pointed out that statutes have frequently been enacted creating liabilities after final action on the general appropriation bill, the obligations so incurred being taken care of by supplemental appropriations passed later in

the year, and quoted the comment from *Opinion of the Justices,* 308 Mass. 601, at page 614, that, "There is no constitutional prohibition against appropriating money to meet expenditures incurred prior to the making of the appropriation."

At page 768 of 323 Mass., the Justices stated:

"What will happen when any appropriations now in existence applicable to the payment of the increased salaries are exhausted, if no new appropriations applicable thereto are by that time made, is a matter not within the scope of the questions submitted. See G. L. (Ter. Ed.) c. 29, § 18, as amended by St. 1945, c. 248, § 3; Constitution, Part II, c. 2, § 1, art. 11."

Your specific questions are as follows:

"(1) In view of your opinion dated November 25, 1959, to the Honorable Frederick J. Sheehan, is the department head required to take action to obtain an allotment in order to pay the salary increases, even when it will result in insufficient funds being available to meet the salaries of permanent employees in the final allotment period of the fiscal year?

"(2) Has the Commission on Administration and Finance the authority to refuse to recommend such an allotment to provide for the payment of salary increases when in their payment it will result in insufficient funds being available for the final allotment period?

"(3) If the answer to question numbered two is in the negative, and such a recommendation is placed before the Governor, is it incumbent upon him to approve the recommendation in the absence of any legal impediment?"

(1) In answer to your first question, I inform you that it is incumbent on the department head to submit to you an estimate of anticipated expenditures for the full payment, or for making up the full payment, at the rates authorized by the Legislature, of salaries of incumbents of permanent positions for the particular allotment period or periods in question. Neither the appointing authority, nor any other State official, can deny the incumbent of a position the salary authorized for the position by the Legislature. A deficiency in the amount appropriated for permanent positions, however else it can be made up, cannot be made up by refusing to pay incumbents the rates fixed and authorized by the Legislature.

(2) In view of my answer to your first question, it follows that the recommendation by the commission of an allotment which would be insufficient to pay the salaries of incumbents of all permanent positions at their full authorized rates for a particular period or periods, if adopted by the Governor, would not have the effect of permitting payment of the incumbents of positions for which the Legislature has authorized higher rates than were applicable in the preceding fiscal period, at the rates which were formerly applicable.

(3) While it is doubtful whether you have the right to request an opinion on a question such as your third question, at least without some showing that the opinion is necessary for the determination of some matter before you, inasmuch as it is clear that the final decision of what amount shall be allotted is for the Governor, and in making his decision he is not bound in any way by the recommendation of the commission and can reject its recommendation and increase or decrease an amount recommended, I

advise you that it would not be incumbent on him to approve a recommendation such as you refer to.

It is apparent from the language quoted above from *Opinion of the Justices*, 323 Mass. 764, 768, that the Justices saw no objection to continuing expenditures at rates authorized by the Legislature, although there was a probability that expenditures at those rates would exhaust the available funds prior to the end of the fiscal period. Although it is clear that under G. L. c. 29, § 18, no payments can be made after the appropriations are exhausted, there is no statutory obligation that expenditures as expressly authorized by the Legislature during any month or other portion of the fiscal year shall not exceed one-twelfth or some other fraction of the total amount appropriated.

The situation is that the Legislature has authorized certain positions at certain salaries, and if it appears likely towards the end of the fiscal year that, despite such personnel changes as may have occurred in particular departments or offices, there will not be sufficient funds available to pay all incumbents at the rates to which they are entitled until the end of the fiscal year, it is to be expected that the Legislature, which is now in session, will make additional funds available either by appropriation or otherwise.

Very truly yours,

EDWARD J. McCORMACK, Jr., *Attorney General.*

The Director of Personnel and Standardization and Commission on Administration and Finance correctly determined that the provision of G. L. c. 30, § 46 (5), permitting the "recruitment" of employees at a rate of salary above the minimum in an emergency, referred to the filling of a position by appointment of one already in the service as well as of one entering it for the first time.

JAN. 21, 1960.

Hon. CHARLES F. MAHONEY, *Commissioner of Administration.*

DEAR SIR: — At the request of the Division of Personnel and Standardization you have asked me for opinions on three questions relating to the application of the provisions of G. L. c. 30, § 46, pars. (5) and (5A).

After receiving your request we asked you for further information, which you furnished us, and the questions were also discussed with representatives of the Division of Personnel and Standardization.

In the discussion referred to it was indicated that it would not be necessary for the director to have an opinion on the first question asked.

Your second and third questions are as follows:

(2) "'B' employed as a director of prison camp in the Department of Correction at a salary of $139.50 per week, was 'promoted' to a 'Principal Officer', Job Group No. 22, in general salary schedule, G. L. c. 30, § 46 (1), at a rate of $195.75 weekly instead of $164.75, the minimum of Job Group No. 22.

"Is this 'recruitment' as meant in G. L. c. 30, § 46, par. (5)?

(3) "'C' an employee employed as an 'Executive Secretary, Commission on Alcoholism' at an annual salary of $6,780 per annum, on July 1,

1956, which is step five in Salary Grade 57 of the general salary schedule in effect at that time, is appointed on February 1, 1959, to the position of 'Superintendent, M.C.I., Bridgewater' allocated to Job Group No. 25 in general salary schedule, G. L. c. 30, § 46 (1), $194 per week or $10,088 annually. The Director of Personnel has been requested to change this salary to $248 weekly or $12,896 annually the maximum of Job Group No. 25 by virtue of G. L. c. 30, § 46, par. (5).

"Can the director of personnel approve such requested salary under the law?"

General Laws c. 30, § 46 (5) and (5A), read as follows:

"(5) The said director may, with the approval of the commission on administration and finance, permit the recruitment of employees at a rate above the minimum, but not exceeding the maximum, of the job group salary range for the class concerned; provided, however, that the said director shall have first determined, upon request of the appointing authority, that an emergency exists due to inability to fill positions. Any such permit shall remain in effect until rescinded by the said director, but shall not be in effect longer than one year unless renewed in like manner and with like approval. Whenever the said director shall permit such recruitment, all employees in the same class, being paid at a rate or rates below such rate of recruitment shall be advanced to the said recruitment rate.

"(5A) The said director shall permit the recruitment of professional personnel at a rate above the minimum and within the grade to which the requested position is allocated upon certification of the appointing authority that the person to be employed has served satisfactorily in a comparable position for a period of time equivalent to the period required by the general salary schedule had such service been entirely in the service of the commonwealth. For the purposes of this paragraph, professional personnel shall include, but shall not be limited to, registered nurses and persons employed in medical or technical positions in hospitals and clinics, including the administration thereof, persons employed for the instruction of students, and engineers and chemists. Nothing in this section shall be construed to limit the recruitment of personnel under the provisions of section thirteen of chapter seventy-five."

The letter in which you furnished us the information we requested, and the discussion referred to, disclose that your second question refers, not to the proposed filling of the position of Principal Officer in the Department of Correction at a rate above the minimum, but to the actual filling of the post at a rate above the minimum permitted in 1956, under G. L. c. 30, § 46 (5), by the then Director of Personnel and Standardization, William Bell, Jr., with the approval of the then Commission on Administration and Finance. In the letter responding to our request for additional information you also informed us that no request has been made to the director by the appointing authority concerned in the case referred to in your third question that the director declare that an emergency exists, and consequently it would follow that no such determination has been made by the director.

Ordinarily, this office renders opinions only when it is shown that the requesting official requires our opinion in relation to some matter pending

for determination before him or the official for whom he requests the opinion. There is nothing in your letter to indicate that there is anything presently before the Director of Personnel and Standardization with relation to the matter referred to in your second question. No request having been made to the director by the appointing authority for the determination of an emergency, it would seem that there is nothing before the director with regard to your third question. Since, however, it appears likely that such a request from the appointing authority might be forthcoming and the representatives of the division stated that the problem raised is of present concern in other cases, your request will be considered as being properly before us.

Your request raises the question as to whether the use of the word "recruitment" in G. L. c. 30, § 46 (5), restricts the benefits of that paragraph to persons entering the service of the Commonwealth for the first time, and excludes from the benefit of the paragraph persons who are already employed in the service of the Commonwealth.

In my opinion, former Director of Personnel and Standardization, William Bell, Jr., was correct in the view he adopted, and in which the Commission on Administration and Finance concurred, that the use of the word "recruitment" in paragraph (5) does not require that the paragraph be construed as applying only to persons entering the service of the Commonwealth for the first time.

"Recruitment" as used in G. L. c. 30, § 46 (5), has reference to the filling of the particular position in question, whether by the appointment of a person entering the service of the Commonwealth for the first time or of a person already in the service of the Commonwealth. The word is used in the sense stated in the New York Civil Service Law. New York Laws, 1958, c. 790, which enacted a revised and recodified Civil Service Law, in Article IV, entitled "Recruitment of Personnel," contains provisions relating both to original appointments and promotions. Paragraph 4 of § 130 of the New York Civil Service Law referred to, providing for increased minimum salaries when it is determined to be impracticable to recruit for a position at its then minimum, uses the word "recruit" with the same broad meaning of filling a position either by the appointment of a person not already in the service or the transfer or promotion of a person already in the service. It would appear probable that § 40 (3) of the N. Y. Civil Service Law of 1909, added by L. 1945, c. 302, § 3, and amended by L. 1954, c. 307, §§ 2 and 16, the predecessor of paragraph 4 of said § 130 was the model for G. L. c. 30, § 46 (5).

There is nothing in G. L. c. 30, § 46 (5), to indicate that the Legislature did not intend that its benefits should extend to persons already in the service of the Commonwealth. G. L. c. 30, § 46 (5A), however, does contain such an indication. The provision of paragraph (5A) that the director shall permit payment at a rate above the minimum only upon certification by the appointing authority that the person to be employed had served satisfactorily in a comparable position for a period of time at least equivalent to the period required by the general salary schedule, "had such service been entirely in the service of the Commonwealth," demonstrates that said paragraph (5A) is not applicable to persons already in the service of the Commonwealth.

I advise you, therefore, in answer to your specific questions, that the provisions of G. L. c. 30, § 46 (5), are applicable, whether the position as

to which an emergency as referred to in the paragraph has been determined is to be filled by appointment of a person already in the service of the Commonwealth or of a person who is not then in the service of the Commonwealth.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

A State agency is required to give a preference to citizens and can contract with an alien only if no citizen is willing to contract on terms at least equal to those offered by the alien.

JAN. 27, 1960.

MR. GEORGE TZIZIK, *Planning Engineer, Department of Commerce.*

DEAR SIR: — You have asked my opinion whether the Commonwealth of Massachusetts, through its Department of Commerce, may enter into a contract with an alien for the purpose of performing planning work under the Federally aided Urban Planning Assistance Program. You enclose a copy of a letter from the Regional Director of Urban Renewal in which he states that, although the Federal Government itself cannot enter such an agreement, he knows of no restriction which would prohibit the Commonwealth from contracting with an alien; provided, such contract is valid under local state law.

The laws of this State do not expressly prohibit the Commonwealth from contracting with aliens, but there are several statutory enactments which require that a preference be given to citizens in the awarding of public contracts for goods and services.

If the goods and services to be acquired are available from citizens on terms at least equal to those offered by aliens, then the contract for such goods and services should be awarded to a citizen. It is only when an alien offers better terms or better goods than are available from citizens that you should undertake to contract with such alien.

Your attention is called to the following statutory provisions which express this policy of the Commonwealth:

G. L. c. 149, § 179A:

"In the awarding of contracts for public work by the commonwealth or by a county, city or town or by persons contracting therewith to do such work, preference shall be given to persons who are citizens of the United States and to partnerships all of whose members are such citizens. Any person who knowingly and wilfully violates this section shall be punished by a fine of not more than two hundred dollars. Nothing in this section shall require the acceptance of a higher bid in preference to a lower bid."

G. L. c. 149, § 164:

"In registering applications for employment and for employees wanted, preference shall be given to residents of the commonwealth."

G. L. c. 7, § 22 (17):

"A preference in the purchase of supplies and materials, other considerations being equal, in favor, first, of supplies and materials manufactured and sold within the commonwealth, . . . and, second, of supplies and materials manufactured and sold elsewhere within the United States."

In conclusion, your agency has authority to award a contract to an alien for providing planning services only if it has first determined that there is no citizen available willing to contract on terms at least equal to those offered by the alien.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

BY JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

The provision of the 1959 General Appropriation Bill (St. 1959, c. 433, § 20) requiring approval of rates for consultant services is not applicable to payments for clerical services by the Senate Committee on Rules.

FEB. 25, 1960.

Mr. FREDERICK J. SHEEHAN, *State Comptroller.*

DEAR SIR: — You state that you have before you for approval an invoice from the Senate Committee on Rules calling for payment of clerical services to an individual at the rate of $100 per month as established by the said committee. You ask whether the provisions of § 20 of St. 1959, c. 433, require that this rate be approved by the Commission on Administration and Finance upon the recommendation of the Director of the Division of Personnel and Standardization.

The provisions of said § 20 are as follows:

"Except as otherwise provided in section thirteen of chapter seventy-five of the General Laws, no agency of the commonwealth receiving an appropriation under section two of this act shall make any expenditure for consultant services, so called, or services coded in accordance with the expenditure code manual under the subsidiary title '03 Services — Non-employees' unless the rate of compensation for such services shall have been approved by the commission on administration and finance upon the recommendation of the director of the division of personnel and standardization. The said director shall, immediately upon the approval of any such rate or rates, file copies of the schedule or schedules of approved rates with the comptroller and with the House and Senate committees on Ways and Means."

It is my opinion that the provisions of § 20 do not apply to the expenditure in question.

You state that the invoice currently before you relates to "clerical services." The appropriation for these services is contained in § 2 of the aforesaid St. 1959, c. 433, under item 0101–07 "For clerical and other assistance including expenses of the senate committee on rules, including not more than seven permanent positions . . . ."

The limitations of § 20 set forth above apply to expenditures for "consultant services" and to expenditures for services under the code manual subsidiary "03 Services — Non-employees."

In respect to the limitation relating to consultants, it would not ordinarily be said that one performing clerical services was acting as a consultant.

In respect to the limitation relating to services paid from the subsidiary "03 Account," it is noted that the Rules Committee Budget Item 0101–07 is not broken down into subsidiary accounts. There is, therefore, no subsidiary "03 Account" applicable to the expenditure in question. The foregoing factors show that the Legislature apparently did not intend to impose limitations on legislative expenditures under the terms of § 20 quoted above.

Consequently, it is my opinion that the limitations of St. 1959, c. 433, § 20, do not apply to the hiring of clerical personnel by the Senate Committee on Rules.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

Salary received for service in the General Court is "earnings from gainful occupation," within G. L. c. 32, § 91A, requiring a refund by a person retired for disability when his earnings plus his pension exceed the compensation for the position he held.

MARCH 7, 1960.

HON. CHARLES FRANCIS MAHONEY, *Commissioner of Administration.*

DEAR SIR: — You have asked my opinion relative to the application of G. L. c. 32, § 91A, to a member of the General Court and you pose the following question:

"Shall the salary of a member of the General Court be counted as 'earnings from gainful occupation' under the provisions of said § 91A?"

You state that the person, formerly an employee of the Registry of Motor Vehicles, was retired from the State service because of disability and is now currently serving as a member of the General Court, duly elected by the people of his district. The person in question claims that his only income in 1959, aside from his retirement allowance, was his salary as a member of the General Court, and contends that that salary is not ". . . earnings from gainful occupation . . ." so as to bring him within the purview of § 91A. In your letter you refer to G. L. c. 32, § 91, which I have in mind. It should be borne in mind that § 91A is a much more

recent enactment than § 91. Section 91 in its present form provides in substance that no person while receiving a pension or retirement allowance from the Commonwealth or from any county, city or town, shall, after the date of his retirement be paid for any service rendered to the Commonwealth or any county, city, town or district, with several exceptions, included among which is an exception in favor of a person rendering service in a public office to which he has been elected by direct vote of the people. Section 91A was approved by the people of the Commonwealth at the State election on November 4, 1958, and in general provides that *every person* pensioned or retired under any general or special law *for disability*, including accidental disability, shall in each year before the last day of January file a sworn statement certifying the full amount of his earnings from gainful occupation during the preceding year. This section further provides that if the earnings exceed, when added to his pension, the regular compensation which he would have otherwise earned had he continued in service, he shall refund such excess.

In my opinion, the person you refer to comes squarely within the provisions of § 91A approved at the State election as I have before stated. Without a doubt, he is a ". . . person pensioned or retired under any general . . . law for disability . . . ." There are no exceptions stated. If the General Court had intended to except from the operation of § 91A its own members it could readily have done so.

As stated in the case of *Arruda* v. *Director General of Railroads*, 251 Mass. 255 at 263: ". . . We cannot supply a *casus omissus*. We can only interpret the law as it was promulgated without regard to our own ideas of expediency." Bearing § 91 in mind, it should be observed that § 91A does not purport to prohibit a pensioned person from being elected as a Representative. It simply provides that a pension for disability shall be reduced or suspended as, when or insofar as it results in an income, including his earnings, for the disabled person of more than the compensation of the position he held at the time of his retirement from the public service.

Therefore, I answer your question in the affirmative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The Governor may submit, and the Council confirm, an appointment to an office made to fill a vacancy to occur because of the expiration of the term of the incumbent.

MAY 12, 1960.

MRS. ELIZABETH M. STOCKBRIDGE, *Executive Secretary Pro Tem.*

DEAR MADAM: — The Executive Council has posed the following question relating to the reappointment of William F. Callahan as a member of the Massachusetts Turnpike Authority to a term expiring on July 1, 1960:

"Can His Excellency submit and the Council confirm in advance a reappointment to an office which does not expire for several weeks?"

I answer the question in the affirmative.

The position in question was established by St. 1952, c. 354. Section 3 of that act provides that members of the Massachusetts Turnpike Authority shall be appointed by the Governor, by and with the advice and consent of the Council.

The term to which Mr. Callahan was appointed expires, according to § 3, on July 1, 1960, but his tenure continues until a successor is duly appointed and qualified. New terms are for a period of eight years.

Although the present term has not expired, the facts indicate that it will expire within a very few weeks. Under these circumstances, the Governor and Council do have authority to make a prospective appointment to fill an anticipated vacancy. I have been unable to locate any statute or decision in this Commonwealth which would otherwise limit power of the Governor and Council. There is an opinion written by one of my predecessors in office, however, involving somewhat dissimilar facts but reaching a similar conclusion. It concludes that prospective appointments may be made to fill anticipated vacancies in public office. I refer you to V Op. Atty. Gen. 116.

If the Governor and Council did not have authority to make appointments for anticipated vacancies during a reasonable period in advance of such vacancy, then it would not be possible to select an appointee in sufficient time so that he could occupy his office during the full statutory limit established by the Legislature. A reasonable interpretation of the powers of the Governor and Council should not result in any such limitation. The result which I have reached is also supported by 67 Corpus Juris Secundum, § 53, page 218.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General.*

A requirement that the contractor for a State highway construct a temporary connection with existing public ways would not come within the provision as to "alterations," but if certain facts are found by the department could be ordered as "extra work."

MAY 18, 1960.

HON. ANTHONY N. DINATALE, *Commissioner of Public Works.*

DEAR SIR: — You state that a question has arisen concerning the validity of an "alteration" issued by your department to a contractor providing for a temporary connection between a section of new highway in Phillipston, Massachusetts, and the existing highway Route 2. The basic contract required the construction of a section of roadway of approximately eleven thousand feet in length terminating about one hundred and thirty-five feet west of the point where the new road would eventually cross Route 2. The contract also provided for a temporary connection between this new section of roadway and said Route 2. The temporary connection was to be made by using Royalston Road, an existing roadway which crosses the new road and which then proceeds to Route 2 at an angle. This proposed method of connection was somewhat circuitous. The department decided to change it by extending the new road for an additional one hundred and thirty-five feet, thus making a

direct connection with Route 2. The change was accomplished by the issuance of an "alteration."

A question has arisen as to whether such an "alteration" may be issued without compliance with the bid statute.

In the first instance, it is noted that the work in question could not have been required to be performed under the original contract. It is therefore not an "alteration" of existing work, but is "extra work" and must be examined in the light of the law relating to extra work orders.

It is a fundamental proposition that changes calling for extra work may be awarded without further compliance with the bid statute only if such changes are incidental to full execution of the work described in the original contract and are of minor importance. In nature, magnitude and expense, the changes must bear a reasonable subsidiary relation to the original contract. The change cannot result in a contract which is new and different in the main aspects. *Morse* v. *Boston*, 253 Mass. 247, 253.

In addition to the tests set forth in *Morse* v. *Boston*, your department, as the awarding authority, must also determine that the contemplated change is in the public interest and that the cost of such work is fair and reasonable. These matters are all questions of fact to be determined by your department.

Assuming that your department has resolved these questions in favor of issuing an extra work order, then you have authority to issue an extra work order providing for above-described limited extension of the roadway. Such extra work order must, of course, comply with the provisions of G. L. c. 29, § 20A.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

BY JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

A transfer of the entire capital stock of a corporation awarded a State highway contract would not constitute an assignment of the contract requiring the assent of the department, without which the Executive Council should not approve the contract.

JUNE 9, 1960.

His Excellency the Governor and The Honorable Council.

GENTLEMEN: — The Executive Secretary of the Council has informed me that there is currently pending before the Council, for approval, certain contracts which have been awarded to Turner & Breivogel, Inc., by the Department of Public Works.

You have requested my opinion as to whether the Council may approve these contracts under either of the following circumstances:

a. Where Campanella & Cardi, Inc., bought the assets of Turner & Breivogel, Inc., sometime subsequent to the bidding and awarding to Turner & Breivogel, Inc.

or

b. Where Campanella & Cardi, Inc. bought the stock of Turner & Breivogel, Inc., sometime subsequent to the bidding and awarding to Turner & Breivogel, Inc.

Although you have not supplied me with a copy of the contracts in question, since these contracts have been awarded by the Department of Public Works it is assumed that the standard specifications of the department are applicable to the contracts in question. Article 65 of said standard specifications provides that a contractor shall not assign his contract without previous written consent of the department.

Under these circumstances, it would appear that a sale of all the assets of Turner & Breivogel, Inc., to Campanella & Cardi, Inc., would include a sale of the contract in question. As such, it would constitute an assignment in violation of the aforesaid Article 65. In this event, the Executive Council should not now approve the contract in question.

If, on the other hand, Campanella & Cardi, Inc., had merely purchased the stock of Turner & Breivogel, Inc., such a transaction would not constitute an assignment of the contract by Turner & Breivogel, Inc. A mere change in ownership of stock in Turner & Breivogel, Inc., would not prevent the Council from approving the contract in question.

For your possible information, please be informed that an attorney representing the two companies in question has informed this office orally that Campanella & Cardi, Inc., purchased the stock of Turner & Breivogel, Inc., but did not purchase the assets of that company. If this is, in fact, correct, then the Council would be in a position to approve the contracts in question if they are otherwise proper.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

Statute for credit to prisoners in "correctional institutions of the Commonwealth" of time of confinement awaiting trial is not applicable to county correctional institutions.

JUNE 21, 1960.

Hon. GEORGE F. MCGRATH, *Commissioner of Correction.*

DEAR SIR: — You have requested an opinion as to whether St. 1960, c. 350, applies to the county correctional institutions or whether the provisions of that act are limited to correctional institutions of the Commonwealth as defined in G. L. c. 125, § 1.

Perusal of the statute itself reveals that said c. 350 bears the caption, "An Act providing for the reduction of sentences of prisoners in correctional institutions *of the Commonwealth* by the number of days such prisoners were confined while awaiting trial." (Emphasis supplied.) The body of the act provides:

"Chapter 127 of the General Laws is hereby amended by inserting after section 129A, the following section: SECTION 129B. The sentence of any prisoner in any correctional institution *in the commonwealth,* who was held in custody awaiting trial shall be reduced by the number of days spent by him in confinement prior to such sentence and while awaiting trial, unless the court in imposing such sentence had already deducted therefrom the time during which such prisoner had been confined while awaiting trial." (Emphasis supplied.)

Inasmuch as St. 1960, c. 350, amends G. L. c. 127, by adding a new section, a proper interpretation of said act requires that all the circumstances surrounding its enactment must be considered.

It is apparent that the intent of c. 350 was to enlarge the scope of G. L. c. 279, § 33A, which provided that "the court on imposing a sentence of commitment to a correctional institution *of the commonwealth* shall order that the prisoner be deemed to have served a portion of said sentence, such portion to be the number of days spent by the prisoner in confinement prior to such sentence awaiting and during trial." (Emphasis supplied.) In its present form this section was enacted into law in 1958. Acts of 1958, c. 173, amended said § 33A, which had first been enacted in 1955. Section 33A, as enacted in 1955, permitted the court, in its discretion, to consider the number of days spent by the prisoner in confinement prior to his sentence awaiting and during trial; whereas the amended § 33A, quoted above, made it mandatory upon the court to consider such time in imposing the sentence.

It is noteworthy that § 33A, as enacted in 1955 and as amended by the Acts of 1958, is limited to correctional institutions of the Commonwealth. The statute under consideration, therefore, would appear to have as its direct beneficiaries the individuals presently serving sentences in correctional institutions as a result of sentences imposed prior to the effective date of St. 1955, c. 770, § 101. This intent is further demonstrated by the fact that attached to the statute under consideration (St. 1960, c. 350) there is a so-called emergency preamble signed by His Excellency Foster Furcolo, Governor of the Commonwealth, and it is there stated that the facts constituting the emergency are, "Postponement of the operation of this act for ninety days would defeat its purpose because the provisions of this act are immediately applicable to many prisoners now confined in the institutions *of the Commonwealth*." (Emphasis supplied.)

In the light of these facts and the apparent intent of the Legislature, it is our opinion that without specific reference to county correctional institutions in said St. 1960, c. 350, the statute is to apply only to correctional institutions of the Commonwealth as defined in G. L. c. 125, § 1. Your question, therefore, is answered in the negative.

Very truly yours.

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH T. DOYLE,
Assistant Attorney General.

The Department of Public Works could lease the top surface of the central artery tunnel under Dewey Square, Boston, to the city, for the erection of a garage, but the city might not have authority to accept; alternative methods of arrangement discussed; taxability of garage referred to.

JUNE 23, 1960.

HON. ANTHONY N. DINATALE, *Commissioner of Public Works.*

DEAR SIR: — You have asked my opinion concerning the authority of your department to negotiate a lease with the city of Boston for the purpose of enabling the city to erect a parking garage on the roof of the Expressway Tunnel in the Dewey Square area of Boston. You state that a portion of the tunnel structure located between Congress Street and Dewey Square has been constructed to support a four or five story structure, dependent on design. In order to assist the city in alleviating the parking situation, it is proposed to lease the top surface of the tunnel to the city for one dollar per year on a long term lease under an agreement that the city would, in turn, have a garage erected on the site by private capital. You suggest that the garage would be taxable by the city and that revenues received by the city would help compensate for tax losses suffered by it because of the taking of private lands for expressway purposes.

If your department determines that the land in question is no longer necessary for State highway purposes, then it has broad power to dispose of such land by sale, lease or otherwise, as provided by G. L. c. 81, § 7E, provisions of which are as follows:

"The department may sell at public or private sale or, with the approval of the governor and council, transfer to another department, or to a city, town, or public authority or agency, lease or rent any portion of the lands or rights in land the title to which has been taken or received or acquired and paid for by it for the purposes set forth in section seven C, and may sell in the same manner, or, with the approval of the governor and council, so transfer, lease or rent any land the title to which has been taken or received or acquired by it which the department determines is no longer necessary for state highway purposes, and may, with the approval of the governor and council, execute a deed thereof, with or without covenants of title and warranty, all in the name and behalf of the commonwealth, to the purchaser, his heirs and assigns, and deposit said deed with the state treasurer, together with a certificate of the terms of sale and price paid or agreed to be paid at said sale, and, upon receipt of said price and upon the terms agreed to in said deed, he shall deliver the deed to said purchaser. The state treasurer may, by the attorney general, sue for and collect the price and enforce the terms of any such sale."

You will note that in most instances, including the situation where a lease is contemplated, the approval of the Governor and Council is required in order to complete the transaction.

The right of the city to acquire property from the department is, of course, subject to the various statutory provisions applicable to the city.

I call your attention to the provisions of St. 1946, c. 474, which authorize the city of Boston to provide public off-street parking facilities. Sub-

division (*a*) of § 1 authorizes the city to acquire for the foregoing purpose such interest in land as may be necessary "except a leasehold estate."

It would appear, therefore, that although the department may have the authority to lease the area in question to the city, there may be a serious question as to whether the city is in a position to accept such lease.

In view of the foregoing, it is suggested either that your department grant to the city an easement of support together with a right to build a structure on the air-space above, or, in lieu thereof, that the department, with the assent of the Governor and Council, transfer the title to the land in question to the city, reserving in the Commonwealth an easement for the road and the tunnel structure itself accompanied by full rights in the Commonwealth to control the road and tunnel structure so that it may be maintained and operated for State highway purposes.

It will be necessary, of course, to spell out in some detail, the scope of the Commonwealth's easement in the event that your department selects this method of approach.

You have made some comment concerning the taxability of the garage when constructed for the city. The taxability of the structure will depend on the nature of the basic agreement between the city and the Commonwealth. Until this is definitely determined, we cannot tell whether the garage would or would not be taxable. In any event, it would appear that the lessee of the garage would be paying rent to the city, which might help compensate the city for the loss of tax revenues.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The amendment to G. L. c. 94, § 217 (relating to offenses involving narcotics other than heroin), which removed a restriction on parole for first offenders, did not operate to relieve persons previously convicted from the restriction.

JUNE 23, 1960.

HON. GEORGE F. MCGRATH, *Commissioner of Correction.*

DEAR SIR: — You have requested my opinion as follows:

". . . whether or not those persons who have been convicted and sentenced for a first offense under the provisions of G. L. c. 94, § 217, prior to the effective date (June 12, 1960) of St. 1960, c. 204, are entitled to a release on parole (1) prior to the effective date of St. 1960, c. 204, (June 12, 1960) or (2) on and after the effective date of St. 1960, c. 204."

General Laws c. 94 § 217, as amended by St. 1957, c. 660, applies to narcotics other than heroin. General Laws c. 94, § 212, applies to heroin. Said § 217 (prior to the 1960 amendment) provides that a person convicted for a first offense is prohibited from release on parole until a minimum term is served; whereas, said § 212 provides that parole may be granted for the first offense but not for subsequent offenses. This distinction in treatment of crimes involving heroin and crimes involving other narcotics is a result of St. 1957, c. 660. Prior to said 1957 amendment, the privilege of parole

in the event of conviction for the first offense extended to both crimes involving narcotics other than heroin and crimes involving heroin.

Under St. 1960, c. 204, amending G. L. c. 94, § 217, the cash fines are eliminated from the section and "delivery" of a narcotic other than heroin is made a new crime. Further, the following sentence is added:

"Except in the case of the first offense, the imposition or execution of the sentence shall not be suspended, and no probation or parole shall be granted until the minimum sentence shall have been served."

The answer to question No. 1 is that no person convicted under the 1957 amendment can be released under the provisions of St. 1960, c. 204, prior to the effective date of said 1960 amendment, which is ninety days after it became law on March 15, 1960, because it was not an emergency measure. Mass. Const. Amend. XLVIII. Prior to the effective date, there is no law in effect; therefore, no official action can be taken under it. V Op. Atty. Gen. 612, 614. *Ahmed's Case*, 278 Mass. 180, 183.

As to question No. 2, the general rule of statutory interpretation is that all statutes are prospective in their operation. *Paraboschi* v. *Shaw*, 258 Mass. 531, 533; *Hanscom* v. *Malden and Melrose Gas Light Co.*, 220 Mass. 1, 3–5.

Furthermore, G. L. c. 4, § 6, provides as follows:

"Second, The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed."

In view of the above statute and cases, St. 1960, c. 204, is in effect a repeal by way of amendment of the provisions of the above cited § 217 that parole cannot be granted for first and subsequent offenses. Under said 1960 act, parole can now be granted for first offenses. To grant a parole in the case of offenders under said § 217 prior to the 1960 amendment would mitigate punishment incurred before the 1960 act took effect. Unless the 1960 act itself states that it shall apply retroactively, the provisions of G. L. c. 4, § 6, must govern. Since the 1960 act has no such provision, the said G. L. c. 4, § 6, applies.

Therefore, the reply to your second question is in the negative because said G. L. c. 4, § 6, provides that a repeal shall not affect any punishment incurred before the repeal of said statute.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By JOSEPH T. DOYLE,
Assistant Attorney General.

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